APPENDIX

IN THE

Supreme Court of the United States

October Term, 1967

No 673

GEORGE CAMPBELL PAINTING CORP.,

Appellant,

against

WILLIAM REID, FRANCIS V. MADIGAN, IRA S. ROBBINS, Members of the New York City Housing Authority, and THE NEW YORK CITY HOUSING AUTHORITY,

Appellees.

GEORGE CAMPBELL PAINTING CORP.,

Appellant,

against

WILLIAM REID, FRANCIS V. MADIGAN, IRA S. ROBBINS, Members of the New York City Housing Authority, and THE NEW YORK CITY HOUSING AUTHORITY,

Appellees.

On Appeal from the Court of Appeals of the State of New York

Filed October 2, 1967

Probable Jurisdiction Noted January 29, 1968

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RECORD OF REVIEW FROM ADMINISTRATIVE DETERMINATION

Notice of Petition

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

Index No. 6987/1965

[SAME TITLE]

SIRS:

PLEASE TAKE NOTICE that upon the annexed petition of George Campbell Painting Corp., verified on the 2nd day of October, 1965, upon all the proceedings heretofore had herein, an application will be made to a Special Term, Part I of this Court, to be held at the New York County Court House, 60 Centre Street, Borough of Manhattan, City and State of New York, on October 25, 1965, at 9:30 A.M., or as soon thereafter as counsel can be heard, for a judgment granting the relief prayed for in the petition, and for such other and further relief this Court may deem just and proper.

TAKE FURTHER NOTICE that petitioner demands that you produce the following papers at the hearing specified above:

1. The letter by District Attorney Frank S. Hogan to William Reid, advising the New York City Housing Authority of the alleged refusal of George Campbell, Jr. to waive immunity;

2. Copies of the decisions, orders, or notices in which the New York City Housing Authority allegedly barred the petitioner from bidding on future contracts; and

3. A copy of the transcript of the deposition of Theodoré Ruzow taken pursuant to Section 157(3) of the Public Housing Law on August 5, 1965, and subscribed to on August 15, 1965.

Dated: New York, New York
October 4, 1965.

Yours, etc.

RUZOW & LIPNER
Attorneys for Petitioner

ALBERT A. BLINDER
Of Counsel

To:

William Reid
Francis I. Madigan
Ira S. Robbins
New York City Housing
Authority

Petition

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

[SAME TITLE]

To the Supreme Court of the State of New York:

Petitioner, George Campbell Painting Corp., by its attorneys, Ruzow & Lipner, complaining of respondents, respectfully alleges:

1. Petitioner is a corporation duly organized under the laws of the State of New York, with its principal place of business at 40-11 149th Street, Flushing, County of Queens.

2. Petitioner is in the business of general painting contracting and, among other things, has been engaged in painting and decorating contracts for the respondent, New York City Housing Authority.

3. Respondents, William Reid, Francis V. Madigan and Ira S. Robbins, respectively, are chairmen and members of the New York City Housing Authority.

4. Respondent, New York City Housing Authority is the agency which cancelled certain existing contracts of the petitioner and barred it from future bidding for five years.

5. The alleged refusal by an officer and director of petitioner to waive immunity occurred in New York County.

6. Petitioner is a corporation which was organized in 1964 with the Estate of George Campbell, Sr., owning fifty

(50%) percent of the stock therein, and the remaining fifty (50%) percent owned equally by George Campbell, Jr., Marian Campbell Rizzi, Anita Campbell Ponte, Jane Campbell Jesinsky and Barbara Campbell Dougherty.

7. Prior to the incorporation of the George Campbell Painting Corp., as aforesaid, the business was conducted as a partnership entitled "George Campbell & Company." The stockholders of petitioner were members of the partnership with the same ownership interest. At all times during his lifetime George Campbell, Sr., was the general partner in charge of the partnership.

8. Under the partnership the aforesaid George Campbell, Sr. was engaged in performing general painting contracting for the respondent, New York City Housing Authority, and for other governmental agencies and sub-divisions within the State of New York and elsewhere, for a period in excess of thirty (30) years. At no time during that period had any of its contracts been cancelled or had it been barred from future bidding because of provisions of Public Authorities Law §2602, General Municipal Law §103(b), or any other corresponding sections of the State or Federal Statutes.

9. After the demise of George Campbell, Sr. on August 2, 1964, petitioner acquired all of the assets and assumed all of the liabilities of the partnership. George Campbell, Jr. was elected president of petitioner. He was also a director and stockholder.

10. On March 26, 1965, the aforesaid George Campbell, Jr. resigned as an officer and director of the petitioner, and on or about that date he divested himself of his stockholdings. A copy of the minutes of the directors' meeting pertaining to the resignation is annexed hereto, made a part hereof and marked Exhibit A.

11. Since March 26, 1965, George Campbell, Jr. has been employed as an estimator, a position which does not entail any management functions.

12. On April 13, 1965, at the office of Albert A. Blinder, 485 Lexington Avenue, New York City, a detective of the New York County District Attorney's Office served a subpoena upon the aforesaid George Campbell, Jr., calling for his appearance before a Grand Jury on Wednesday, April 14, 1965.

13. On April 14, 1965, George Campbell, Jr. appeared before the Grand Jury and refused to sign a waiver of immunity thereat.

14. Upon information and belief, New York County District Attorney Frank S. Hogan, advised the respondent, New York City Housing Authority, of such refusal in a letter to the respondent Reid.

15. Upon information and belief, as a result of the aforesaid letter, the respondent, New York City Housing Authority, upon the decision made by the respondents Reid, Madigan and Robbins, cancelled the existing contracts of the George Campbell Painting Corp. and barred it from future bidding with respondent, New York City Housing Authority, for five years.

16. Thereafter a letter was sent to the petitioner by the New York City Housing Authority informing it of the Authority's action. A copy of the letter is annexed hereto, made a part hereof and marked Exhibit B.

17. On March 29, 1965, Ernest Ponte, a vice-president of the petitioner, was subpoenaed to appear before the same Grand Jury allegedly investigating painting contracts. On

March 30, 1965, the aforesaid Ernest Ponte appeared at the office of the District Attorney and was interviewed by an assistant district attorney. At that time the assistant district attorney in charge was informed that the aforesaid Ernest Ponte was willing to sign a waiver of immunity. The assistant district attorney informed the aforesaid Ernest Ponte that his appearance was not required on that date, but that at a later time he would be recalled. The aforesaid assistant district attorney was told that Mr. Ponte would cooperate with the Grand Jury and would appear whenever a request was made through counsel.

18. On or about the 20th day of April, 1965, other officers and directors of the petitioner, to wit, Marian Campbell Rizzi, Elizabeth Campbell, George Morvan, Theodore Ruzow and Ernest Ponte, were requested to appear before the Grand Jury. Each of the aforesaid officers and directors voluntarily appeared on the 22nd day of April, 1965, each advised the assistant district attorney that he (or she) would sign a waiver of immunity, did in fact so sign. Later, George Morvan, Theodore Ruzow and Ernest Ponte were asked to appear before the Grand Jury and each answered any and all questions put to him by the aforesaid Grand Jury and its legal representative. (Marion Campbell Rizzi and Elizabeth Campbell were excused without being asked to testify.)

19. No agreements of any kind have been entered into with the aforesaid George Campbell, Jr. about his reinstatement as an officer and director. The petitioner does not now intend to reemploy or otherwise reengage his services as an officer and director.

20. The petitioner, as aforesaid, through its other officers and directors as aforesaid, has cooperated with the District Attorney's investigation. Moreover, its books and

records have been made available to other city agencies in connection with their investigations.

21. The titles of the officers and directors of the petitioner who voluntarily testified and/or signed waivers of immunity are:

George Morvan
Executive Vice-President, Director

Ernest Ponte
Vice-President

Theodore Ruzow
Director

Marion Campbell Rizzi
Secretary, Director

Elizabeth Campbell
Treasurer, Director

22. During the past thirty years, petitioner's predecessor partnership, and since its incorporation, the petitioner, has constituted one of the largest painting contractors in the area. Its reputation for public service contracts has been the highest. Among the major contracts undertaken and satisfactorily completed by the petitioner and its predecessor partnership during the last ten years have been:

United States Military Academy
West Point, New York

Oahe Reservoir
Pierre, South Dakota

General Electric Appliance Park
Louisville, Kentucky

Triboro Bridge
New York

Whitestone Bridge
New York

Henry Hudson Bridge
New York

Walt Whitman Bridge
Philadelphia, Pa.

Mid-Hudson Bridge
New York

Memphis Arkansas Bridge
Memphis, Tenn.

Ravenswood Generating Plant
New York

Astoria Generating Plant
New York

Mahlstrom Airforce Base
Great Falls, Montana

Scott Airforce Base
Illinois

Loring Airforce Base
Caribou, Maine

New York State Court of Appeals
Albany, New York

Creedmoor Hospital
New York

Harlem Valley State Hospital
Pawling, New York

Booth Memorial Hospital
Queens, New York

Veteran's Administration Hospital
New York

United States Court House
Foley Square, New York City, New York

Yeshiva University
New York

Municipal Court, City of New York
New York

Bronx City Prison
New York

Raymond Street Jail
Brooklyn, New York

Grumman Aircraft Company Plant
Brookhaven, New York

23. George Campbell, Jr. is twenty-four years of age. He is a ten (10%) percent residuary legatee under the estate of his late father, George Campbell, Sr. No distribution has as yet been made to any legatees under the aforesaid estate which is being probated in the Surrogate's Court of Queens County, New York.

24. The aforementioned ten (10%) percent undistributed interest in the estate constitutes the only beneficial interest which George Campbell, Jr. now has in petitioner. Upon the final distribution of the assets of the estate, petitioner anticipates that George Campbell, Jr. will receive as his share a monetary payment in lieu of a distribution in kind of the stock in petitioner now owned by the estate.

25. The work done by the petitioner and its predecessor partnership during the last five years for respondent, New York City Housing Authority, has constituted less than fifteen (15%) percent of its total annual volume. At the present time the work for the respondent, as aforesaid, constitutes an even smaller percentage of its gross sales.

26. The action by the respondents, Reid, Madigan and Robbins, and the New York City Housing Authority, purportedly was pursuant to Section 2602 of the Public Authorities Law in that the aforesaid respondents thought that the aforesaid section had been violated by a member, partner, director, or officer of the petitioner refusing to sign a waiver of immunity.

27. Respondents in barring the petitioner from future bidding for five years for the alleged refusal of George Campbell, Jr. to waive immunity before the New York County Grand Jury, violated the rights of your petitioner, and your petitioner respectfully submits that this action by respondents, Reid, Madigan, Robbins and the New York City Housing Authority was an abuse of their discretion and was decided arbitrarily and capriciously, based upon erroneous information and/or interpretation of the aforesaid section of the Public Authorities Law.

28. Such acts by the respondents were arbitrary, capricious and an abuse of discretion in that the aforesaid George Campbell, Jr., was no longer an officer, director, or stockholder of the petitioner at the time he refused to waive immunity before the Grand Jury, and moreover, was not an officer, director, or stockholder at the time a subpoena was served upon him for his appearance as aforesaid.

29. The decision by the respondents, Reid, Madigan, Robbins and the New York City Housing Authority on or

about April 21, 1965, to bar and disqualify as aforesaid, was arrived at without a hearing being held, despite the fact that they were informed by letter dated April 9, 1965, that the aforesaid George Campbell, Jr. was no longer an officer and director of the corporation. Likewise, by letter bearing the same date, the District Attorney of New York County, Frank S. Hogan, was notified that the aforesaid George Campbell, Jr. was no longer an officer, director, or stockholder of said corporation.

30. After notice by the respondents, Reid, Madigan, Robbins and the New York City Housing Authority of the barring and disqualification as aforesaid, a letter dated April 23, 1965 was sent by the petitioner through its counsel to the respondent, requesting an immediate hearing. A copy of the letters dated April 9, 1965 and April 23, 1965 are annexed hereto, made a part hereof and designated as Exhibits C and C-1.

31. When no reply was received concerning the aforesaid Exhibit C, a telegram was sent by one of the counsel for petitioner on April 27, 1965, again requesting a hearing. A copy of the aforesaid telegram is annexed hereto, made a part hereof and marked Exhibit D.

32. On or about May 5, 1965, respondent, New York City Housing Authority, replied to petitioner's requests by letter, to the effect that no useful purpose would be served by holding a hearing. A copy of the aforesaid letter is annexed hereto, made a part hereof and marked Exhibit E.

33. Petitioner submitted a notice of claim to the respondent, New York City Housing Authority, a copy of which is annexed hereto, made a part hereof, and marked Exhibit F. More than thirty days have elapsed since the notice of claim was served and since then the deposition, pursuant to Section 157(3) of the Public Housing Law was

concluded by the respondent New York City Housing Authority.

34. Petitioner holds other contracts with governmental bodies, subdivisions and authorities within the State of New York. The decision by the New York City Housing Authority and its members, as aforesaid, has caused and will continue to cause irreparable damage to petitioner's goodwill and reputation in the community, with a resulting loss of business, and may well jeopardize its continuing relationship with government departments, agencies, authorities or their subdivisions within the State of New York.

35. On or about April 21, 1965, upon the alleged erroneous findings of the respondents, Reid, Madigan, Robbins and the New York City Housing Authority, the aforesaid respondents directed their Director of Public Relations, one Oscar Kanny, to release a "news release" which was disseminated not only among all the news media within this county and state, but was also sent to other public officials at governmental agencies, departments, bureaus and their subdivisions with whom the petitioner has contracts extant. A copy of the news release is annexed hereto, made a part hereof and marked Exhibit G.

36. Upon all the foregoing and the cancellation of the three contracts described in Exhibit C annexed hereto, petitioner is now suffering irreparable and irremedial injury which will continue for the next five years as a result of the arbitrary, capricious and erroneous decision referred to above.

37. For the reasons above stated, and in view of the limited amount of financial interest of the aforesaid George Campbell, Jr. at the time of his refusal to sign a waiver of immunity, the petitioner believes that it will not be in the public interest to countenance the disqualification alleged above.

38. Petitioner, to the knowledge of any of its officers and directors, denies that it has engaged in any practices which were illegal under any state or federal law, or under any city ordinance or regulation.

39. This petition applies only to the disqualification portion of the notice of claim heretofore served.

40. Petitioner has no adequate remedy at law.

41. Petitioner commenced a special proceeding on or about May 5, 1965, in this Court. Upon the return date thereof respondents moved to dismiss for, among other reasons, the failure of petitioner to allege that more than thirty days had elapsed between the time of the filing of the notice of claim and the commencement of the special proceeding. Justice William Lyman sustained the motion on this ground, but granted petitioner leave to renew upon compliance therewith. As set forth above in paragraph 33, petitioner has complied with the thirty-day requirement and makes this petition pursuant to the previous decision of Mr. Justice Lyman.

WHEREFORE, petitioner prays that an order be granted herein pursuant to Article 78 of the Civil Practice Law and Rules annulling the determination by respondents barring and otherwise disqualifying petitioner from future bidding for a period of five (5) years and for such other and further relief as to this Court may seem just and proper.

Ruzow & Lipner
Attorneys for Petitioner

Albert A. Blinder
Of Counsel

(Verified Oct. 2, 1965.)

Exhibit A Annexed to Petition

Copy of Minutes of Directors' Meeting

MINUTES OF A SPECIAL MEETING

OF

BOARD OF DIRECTORS

GEORGE CAMPBELL PAINTING CORP.

A special Meeting of the Board of Directors of GEORGE CAMPBELL PAINTING CORP. was held on the 9th day of April, 1965 at 10:30 AM o'clock in the offices of Ruzow and Lipner, 501 Fifth Avenue, New York City.

The following were present:

George Morvan	Jane Jesinsky
Marian Rizzi	Elizabeth Campbell
Anita Ponte	Theodore M. Ruzow

Theodore M. Ruzow served as Acting Chairman and called the meeting to order.

The Acting Chairman presented the resignation of George Campbell, Jr., as President and Director of GEORGE CAMPBELL PAINTING CORP. dated March 26, 1965, and also surrendered Stock Certificate #6 in the amount of 10 shares transferred to GEORGE CAMPBELL PAINTING CORP. to the Directors of GEORGE CAMPBELL PAINTING CORP. at the meeting.

On motion duly made, seconded and unanimously carried, it was

> RESOLVED, that committee be elected to select a president. The committee to be Elizabeth Campbell, Jane Jesinsky, Anita Ponte, with Marian Rizzi as Secretary to the Committee.

RESOLVED, that the Committee would give their report in thirty (30) days.

There being no further business before the meeting, the same was, on motion, duly adjourned.

Dated: April 9, 1965

Marian Rizzi
Secretary

Letter of Resignation Dated March 26, 1965 Annexed to Exhibit A

March 26, 1965

To The Board of Directors
George Campbell Painting Corp.

I hereby resign as Director and President of George Campbell Painting Corp. effective immediately.

George W. Campbell, Jr.

Witness:

Theodore M. Ruzow
Harry Lipner

Exhibit B Annexed to Petition

Letter Dated April 21, 1965

[LETTERHEAD OF]

NEW YORK CITY HOUSING AUTHORITY
250 Broadway
New York, N. Y. 10007

April 21, 1965

George Campbell Painting Corp.
40-11 149th Street
Flushing 52, New York

Re: Contracts Nos.
PD 65-5A (McKinley, Morris & Morrisania)
PD 65-10C (First & Riis (F & C)
PD 65-14B (Lehman & Taft)

Gentlemen:

The Authority has been officially informed by the District Attorney of New York County that George Campbell, Jr., an officer of your company, has refused to waive immunity when subpoenaed to testify before the Grand Jury of that county in connection with a pending investigation to determine whether the crimes of bid rigging on public contracts, bribery of a public officer, bribery of a labor official, extortion, coercion, assault, and conspiracy to commit each of those crimes, has occurred in New York County.

Please take notice that by reason of the foregoing, and pursuant to the provisions of Section 38 of the General Conditions of the above contracts, the Authority has directed, and you are hereby advised, that such Contracts be and they hereby are cancelled and terminated, effective immediately. You are directed to remove immediately from

each of the projects covered by the above Contracts all your materials and equipment.

Please take further notice that in accordance with the further provisions of said Section 38 the Authority has directed, and you are hereby advised, that said George Campbell, Jr., and any firm, partnership or corporation of which he is a member, partner, director or officer, including your company, has been and will be disqualified from selling to or submitting bids to or receiving awards from or entering into any contracts with the Authority for goods, work or services, for a period of five (5) years after such refusal.

Yours very truly,

Gerald J. Carey
General Manager

Certified Mail
Return Receipt Requested

Exhibit C Annexed to Petition

Letter Dated April 9, 1965

[LETTERHEAD OF]

GEORGE CAMPBELL PAINTING CORP.
40-11 149th Street
Flushing, N. Y. 11352

April 9, 1965

New York City Housing Authority
250 Broadway
New York, New York 10007

Gentlemen:

Please be advised that George William Campbell, Jr. resigned as an officer and director of our corporation on March 26, 1965.

Very truly yours,

GEORGE CAMPBELL PAINTING CORP.
Marian Rizzi
Secretary

Pnsc

Exhibit C-1 Annexed to Petition

Letter Dated April 23, 1965

[LETTERHEAD OF]

RUZOW & LIPNER
ATTORNEYS AND COUNSELLORS AT LAW
501 Fifth Avenue
New York 17, N. Y.

April 23, 1965

New York City Housing Authority
250 Broadway
New York, New York 10007

Att. Mr. Gerald J. Carey
General Manager

Re: George Campbell Painting Corp.
Morris Houses, McKinley and
Morrisania Houses
Contract No. PD 65-5A
Amt. of Contract—$80,630.00

First and Riis Houses
Contract No. PD 65-10C
Amt. of Contract—$61,395.00

Lehman Village & Taft Houses
Contract No. PD 65-14B
Amt. of Contract—$8,500.00

Dear Sir:

We are the attorneys for George Campbell Painting Corp. and have been requested to write to you by our client, with regard to the following matter.

On April 9, 1965, a letter was addressed to the Authority advising you that George William Campbell, Jr. had re-

signed as an officer and director of their corporation on March 26, 1965, a copy of which is attached herewith.

On April 20, 1965, the employees of George Campbell Painting Corp. were directed to cease their work at the site.

On April 21, 1965, George Campbell Painting Corp. received a requisition, which contained a written statement to the effect that their contract was cancelled April 20, 1965.

On April 21, 1965, the undersigned spoke to Mr. Fitzsimmons of the Legal Department of the New York City Housing Authority and was informed that a letter was in the mail to George Campbell Painting Corp. cancelling the several contracts between the Authority and them, including the above referred to contracts.

Mr. Fitzsimmons further said that this action was taken as a result of information received from the District Attorney of New York County's office and mentioned having received it from Assistant District Attorney Joseph Phillips. At this point in the conversation, the undersigned asked Mr. Fitzsimmons if the Authority had received and had before it, at the time it made the decision to cancel the contracts of George Campbell Painting Corp., the aforesaid letter of April 9, 1965 attached herewith. Mr. Fitzsimmons did not answer the question propounded and I then told him that the letter stated that George William Campbell, Jr. had resigned as an officer and director of George Campbell Painting Corp. on March 26, 1965 and that this was a fact. I also informed Mr. Fitzsimmons that a similar communication had been sent to Mr. Joseph Phillips, Assistant District Attorney, on April 9, 1965, giving Mr. Phillips the same information regarding the resignation of Mr. Campbell.

I requested Mr. Fitzsimmons to arrange a hearing or give the contractor and his attorneys some opportunity to present the facts regarding the resignation, because of their significance relevant to the acts of cancellation of the contracts by the Authority.

Exhibit C-1 Annexed to Petition

On April 23, 1965, George Campbell Painting Corp. received a letter from the Authority formally notifying it of the proposed cancellation of the above referred to contracts.

I direct your attention to Section 38 of the Amendments to General Conditions entitled "Cancellation and Disqualification for Failure to Waive Immunity". It is a fact that George William Campbell, Jr. refused to waive immunity at an appearance before a Grand Jury of New York County on April 14, 1965.

Your attention is directed to Subdivision (a) of Section 38, which clearly speaks in the present tense, when it refers to the disqualification of the person failing to waive immunity and in Subdivision (b), it speaks in the present tense, when it refers to the right of the Authority to cancel existing contracts as a result of the relationship between the person failing to waive immunity and the corporation under contract with the Authority.

It is respectfully submitted that if George William Campbell, Jr. resigned as an officer, director and stockholder prior to his being called upon to waive immunity and prior to his failure to waive immunity, that the provisions of Section 38 have no application and should not be applied or enforced by the Authority, with relation to any contracts existing between the Authority and George Campbell Painting Corp.

Please be advised that all officers and directors of George Campbell Painting Corp., who have been requested to appear before the New York County Grand Jury have voluntarily appeared, without subpoena, and have voluntarily signed waivers of immunity.

As time is of the essence and great and irreparable harm and damages are accruing hourly to George Campbell Painting Corp., this letter is being hand-delivered to your office, to request an immediate hearing by the Authority with regard to the cancellation of the contracts and the

application of Section 38 thereto and the related question of the resignation of George William Campbell, Jr. as an officer, director and stockholder of George Campbell Painting Corp.

Very truly yours,

RUZOW & LIPNER
By

TMR;ag
Enc. Copy of letter of
George Campbell Painting Corp.
dated April 9, 1965

DELIVERED BY HAND

Exhibit D Annexed to Petition

Telegram Dated April 27, 1965

WESTERN UNION

[TELEGRAM]

New York NY Apr 27 1965

Gerald J Carey

N. Y. City Housing Authority 250 Bway NYK

We respectfully request prompt reply to our letter of April 23rd regarding George Campbell Painting Corp. requesting hearing on cancellation.

Theodore M Ruzow 501 Fifth Ave. NYC

Exhibit E Annexed to Petition

Letter Dated May 5, 1965

[LETTERHEAD OF]

NEW YORK CITY HOUSING AUTHORITY
250 Broadway New York, N. Y. 10007

May 5, 1965

Ruzow & Lipner, Esqs.
501 Fifth Avenue
New York 17, N. Y.

Re: George Campbell
Painting Corp.

Gentlemen:

This will acknowledge your letter of April 23, 1965 and telegram of April 27, 1965.

The contents of your letter indicate no basis for any change in the Authority's determination, and you are therefore advised that there is no purpose to further correspondence upon or discussion of this matter.

Yours very truly,

Gerald J. Carey
General Manager

Exhibit F Annexed to Petition

Notice of Claim Dated July 2, 1965

In the Matter of the Claim of

GEORGE CAMPBELL PAINTING CORP.

against

THE NEW YORK CITY HOUSING AUTHORITY

SIRS:

TAKE NOTICE that the undersigned, GEORGE CAMPBELL PAINTING CORP., with its principal place of business at 40-11 149th Street, Flushing, County of Queens, New York, claims:

1) Damages against The New York City Housing Authority in the sum of ONE MILLION ($1,000,000.00) DOLLARS,

2) A right to have its cancelled contracts with The New York City Housing Authority reinstated, and

3) The order barring it from future bidding for a period of five (5) years vacated, because of The New York City Housing Authority's wrongful interpretation and application of the provisions of the contract entered into by and between George Cambell Painting Corp. and The New York City Housing Authority and the applicable statutes.

The damages, wrongful cancellation of the contracts and wrongful barring of the claimant from future bidding for a period of five (5) years were sustained as a result of the

action by The New York City Housing Authority purportedly pursuant to provisions of the contract and applicable statutes claiming a violation thereof by a member, partner, director or officer of the claimant refusing to sign a waiver of immunity. The New York City Housing Authority in making the determination of cancelling the existing contracts and barring petitioner from future bidding for five (5) years for the alleged refusal of George Campbell, Jr. to waive immunity before the New York Grand Jury, was a breach of contract and violated the claimant's rights and was based upon the erroneous information and/or interpretation of the aforesaid contracts and statutes in that the aforesaid George Campbell, Jr. was no longer an officer, director or stockholder of the petitioner at the time he refused to waive immunity before the Grand Jury, and, moreover, was not an officer, director or stockholder at the time a subpoena was served upon him for his appearance as aforesaid. The decision by The New York City Housing Authority was arrived at despite the fact that they were informed by letter dated April 9, 1965 that George Campbell, Jr. was no longer an officer and director of the corporation.

The undersigned, George Campbell Painting Corp., claims damages in the sum of One Million ($1,000,000.00) Dollars for loss of profits on contracts they were prevented from obtaining because of said wrongful determination by The New York City Housing Authority.

Take Further Notice that the undersigned, George Campbell Painting Corp., hereby presents its claims as aforesaid respectively for adjustment, reinstatement, vacature of the existing prohibition and payment, and notifies you that unless the same are adjusted, reinstated, vacated and paid within thirty (30) days from the date of their presentation to you, it is the intention of the undersigned to commence an action or actions, a proceeding or proceed-

ings thereon in the Supreme Court of the State of New York, County of New York, against The New York City Housing Authority and its members for the relief sought herein, with costs and disbursements in the action or actions, proceeding or proceedings as aforesaid.

Dated: Flushing, New York
July 2, 1965

GEORGE CAMPBELL PAINTING CORP.

By MARIAN C. RIZZI

State of New York)
County of Queens) ss.:

On this 2nd day of July 1965, before me personally came Marian C. Rizzi, to me known, who, being duly sworn, did depose and say, that she resides at 55 Rose Drive, Great Neck, New York; that she is the Secretary of George Campbell Painting Corp., the corporation described in and which executed the foregoing instrument; that she knows the seal of said corporation, that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the board of directors of said corporation, and that she signed her name thereto by like order.

HARRY LIPNER
Notary Public

HARRY LIPNER
Notary Public, State of New York
No. 41-7564430 Queens County
Term Expires March 30, 1966

Exhibit F Annexed to Petition

State of New York)
County of Queens) ss.:

MARIAN C. RIZZI, being duly sworn, deposes and says:

That she is the Secretary of George Campbell Painting Corp., the corporation named in the within Notice of Claim; that she has read the foregoing Notice of Claim and knows the contents thereof; and that the same is true to her own knowledge, except as to the matters therein stated to be alleged upon information and belief and as to those matters, she believes it to be true.

Deponent further says that the reason this verification is made by deponent and not by George Campbell Painting Corp. is because the said George Campbell Painting Corp. is a domestic corporation and deponent is an officer thereof, to wit, its Secretary.

MARIAN C. RIZZI

Sworn to before me this
2nd day of July 1965

HARRY LIPNER
Notary Public, State of New York
No. 41-7564430 Queens County
Term Expires March 30, 1966

Exhibit G Annexed to Petition

NEW YORK CITY HOUSING AUTHORITY

News Release Dated Friday, May 28, 1965

250 Broadway
New York, N. Y. 10007

From: Oscar Kanny
Director of Public Relations
433-5013

For Immediate Release
Friday, May 28, 1965

William Reid, Chairman of the New York City Housing Authority, announced today cancellation of the existing contracts of Eli Smith of Smith Decorating Co., Inc., 327 Canal Place, the Bronx and barring it from future bidding for five years for refusing to answer relevant questions before the New York County Grand Jury.

Contracts total $193,061.

This action was taken pursuant to the terms of the contracts under which a contractor who after signing a waiver of immunity refuses to answer relevant questions before a Grand Jury and therefore incurs these penalties.

New York County District Attorney Frank S. Hogan had advised the Authority of such refusal in a letter to Mr. Reid received this morning and the above action by the Authority followed later in the day.

District Attorney Hogan's office, with the Authority's cooperation, has been conducting an exhaustive investigation into painting contracts.

Notice of Respondents' Cross-Motion

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

[SAME TITLE]

SIRS:

PLEASE TAKE NOTICE that upon the notice of petitioner's motion herein dated October 4, 1965, the petition herein of George Campbell Painting Corp., verified the 2nd day of October, 1965, the exhibits annexed thereto, and upon all the proceedings heretofore had herein, the undersigned will cross-move this court at Special Term, Part I, on October 25, 1965, at 9:30 A.M. upon the return of the application made herein by petitioner for judgment,

Pursuant to Section 7804(f) CPLR, dismissing the petition as a matter of law, upon the following grounds:

(a) Petitioner has an adequate remedy at law.

(b) The petition fails to state facts sufficient to warrant the relief sought therein;

(c) The determination sought to be challenged herein should properly, and could adequately, have been reviewed by appeal to this court pursuant to the provisions of Section 2603 of the Public Authorities Law; and

(d) This proceeding is accordingly barred under the provisions of Section 7801 subdivision 1, CPLR, and this court does not have jurisdiction of the subject matter in this proceeding.

Dated: New York, October 20, 1965.

Yours, etc.,

HARRY LEVY
Attorney for Respondents

To:

RUZOW & LIPNER, Esqs.
Attorneys for Petitioner
ALBERT A. BLINDER, of Counsel

Order and Judgment Dismissing the Petition

At a Special Term, Part I of the Supreme Court of the State of New York, held in and for the County of New York, at the County Courthouse thereof, on the 14th day of December, 1965.

Present:

Hon. GEORGE TILZER, Justice.

Index No. 6987/65

In the Matter of the Application of
GEORGE CAMPBELL PAINTING CORP.,
Petitioner,

against

WILLIAM REID, FRANCIS V. MADIGAN, IRA S. ROBBINS, members of the New York City Housing Authority, THE NEW YORK CITY HOUSING AUTHORITY,
Respondents,

For a Review pursuant to Article 78 of the Civil Practice Law and Rules.

Petitioner, by its attorneys, Ruzow & Lipner, having duly petitioned for an order annulling the determination by respondents barring and otherwise disqualifying petitioner from future bidding on public contracts for a period

Order and Judgment Dismissing the Petition

of five years, respondents having cross-moved to dismiss the petition, and said petition and cross motion having regularly come on to be heard,

Now, upon reading and filing the notice of petition, dated October 4, 1965, the petition verified October 2, 1965, by Marian Campbell Rizzi, secretary of petitioner, in support of the motion with exhibits annexed and upon the notice of cross motion dated October 20, 1965, and after hearing Ruzow & Lipner, Esqs., Albert A. Blinder, Esq., of counsel, in support of the petition, and in opposition to the cross motion, and Harry Levy, Esq., Paul W. Hessel, and I. Stanley Stein, Esq., of counsel, in opposition to the petition and in support of the cross motion, and after due deliberation having been had hereon,

Now, upon motion of Ruzow & Lipner, attorneys for petitioner, it is

ORDERED, that the petition is denied and the cross motion granted and it is further

ORDERED, ADJUDGED AND DECREED that the petition be and the same hereby is dismissed, that the foregoing be without prejudice to petitioner commencing a plenary action for the same or similar relief requested in the petition herein.

Enter

/s/ George Tilzer
J. S. C.

JAMES MCGURRIN, Clerk

Filed Jan. 10, 1965 at 10:45 A.M.
County Clerk's Office of New York County

Opinion of Tilzer, J.

(48 Misc. 2d 544, 265 N.Y.S. 2d 304)

This is an article 78 proceeding instituted by petitioner for an order annulling the determination made by respondent New York City Housing Authority barring and otherwise disqualifying petitioner from future bidding on public contracts for a period of five years. Respondent cross-moves, prior to answer, to dismiss the petition on multiple grounds.

The proceeding stems from the refusal of an alleged former officer of petitioner, George Campbell, Jr., to sign a waiver of immunity when called before a grand jury of New York County, in its investigation to determine whether the crime of bid rigging on public contracts, among others, had occurred in New York County.

The petition alleges that George Campbell, Jr., resigned on March 26, 1965, as an officer or director of petitioner, and on or about that date divested himself of his stockholdings. That since that date, he had been employed as an estimator by petitioner, a position which does not entail any management functions. That thereafter, on April 13, 1965, he was served with a subpoena to appear before the grand jury on April 14, 1965; that he did appear on said date, but refused to sign a waiver of immunity and was not questioned by the grand jury.

Such alleged resignation and divestiture of his stock interest in the corporation by George Campbell, Jr., prior to his refusal to waive immunity, appears to be the basis for this proceeding.

The question for determination is whether the petitioner presents a proper case for an article 78 proceeding. Respondents contend that petitioner has an adequate remedy at law. They rely on Public Authorities Law, section 2601, requiring that a clause shall be inserted in all contracts with any public authority created by the state for work or services performed or to be performed or goods sold or to be sold, that upon the refusal of any person when called to testify before a grand jury concerning any transaction or contract had with the state, public authority, &c., to sign a waiver of immunity, such person, and any firm, partnership or corporation of which he is a member, partner, director or officer, shall be disqualified from thereafter selling to or submitting bids to or receiving awards from or entering into any contracts with any public authority for goods, work or services for a period of five years after such refusal. The provision, mandated by section 2601, is contained in each of respondent's contracts with petitioner, under section 38 of the amendments to the general conditions thereof.

Respondent received a letter from the District Attorney of New York County stating that said George Campbell, Jr., of the petitioner corporation had refused to sign a waiver of immunity before the grand jury. Upon receipt of the district attorney's letter, the authority canceled the painting contracts with petitioner, and disqualified petitioner, as well as said George Campbell, Jr., and any other firm, partnership or corporation of which he is a member, partner, director or officer, from entering into contracts with the authority for a period of five years. Petitioner was so informed by letter of the Authority. This letter states that such action was taken pursuant to section 38

of the General Conditions of the contracts. Thus respondent argues that the disqualification is pursuant to contract with petitioner and if it was erroneous, petitioner's remedy is by way of plenary suit based on the contract.

The fact that section 38 of the General Conditions of the contracts was incorporated therein by reason of the mandate of section 2601 of the Public Authorities Law does not make its provisions any the less a purely contractual matter between the Authority and the petitioner. Here it appears that petitioner has a remedy based upon contracts with respondent.

The scheme of the Public Authorities Law provides not one, but two means by which the penalty of disqualification may be invoked against a recalcitrant contractor refusing to cooperate in a grand jury investigation involving public contracts. Thus, section 2601 provides for the mandatory contract provision whereby both cancellation and disqualification may be applied as a matter of contractual agreement between a public authority and such contractor. Section 2602, on the other hand, provides a purely statutory basis solely for disqualification even if such contractual provision were non-existent.

The court is not persuaded that this is a proper case for a proceeding under article 78. It is available only in those situations where there are no other remedies and the conditions surrounding its use are not found in the ordinary plenary suit (Matter of Wilson v. Board of Education, &c., 276 App. Div. 482).

Accordingly, the application is denied and the cross-motion is granted dismissing the petition without prejudice to a plenary suit. Settle judgment.

Stipulation as to Prior Proceedings

SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION—FIRST DEPARTMENT

In the Matter of the Application of

GEORGE CAMPBELL PAINTING CORP.,

Petitioner-Appellant,

against

WILLIAM REID, FRANCIS V. MADIGAN, IRA S. ROBBINS, members of the New York City Housing Authority, and THE NEW YORK CITY HOUSING AUTHORITY,

Respondents-Respondents.

For a Review pursuant to Article 78 of the Civil Practice Law and Rules.

IT IS HEREBY STIPULATED AND AGREED by and between the attorneys for the respective parties hereto that the Notice of Respondents' Cross-Motion appearing at page 33 of this record referring to "all the proceedings heretofore had herein" relates to an Article 78 proceeding also bearing Index No. 6987/65 but having as its caption the following:

Stipulation as to Prior Proceedings

Index No. 6987/65

In the Matter of the Application

of

GEORGE CAMPBELL PAINTING CORP.,

Petitioner,

For a Review Pursuant to Article 78 of the Civil Practice Law and Rules and Section 103(c) of the General Municipal Law,

against

WILLIAM REID, FRANCIS V. MADIGAN, IRA S. ROBBINS, members of The New York City Housing Authority, THE NEW YORK CITY HOUSING AUTHORITY, LOUIS J. LEFKOWITZ, Attorney General of the State of New York and FRANK S. HOGAN, District Attorney of the County of New York,

Respondents.

IT IS FURTHER STIPULATED AND AGREED, subject to the approval of this Court that either party has the right to refer to this prior proceeding in briefs or on the argument in the interest of justice since it was referred to in the briefs and argument before Mr. Justice Tilzer whose order and judgment is the subject of this appeal. Upon the argument of this appeal, the original file in said prior proceeding will be subpoenaed from the Clerk of New York County to be made available to this Court.

Dated: New York, April 11, 1966.

RUZOW & LIPNER
Attorneys for Plaintiff-Appellant

HARRY LEVY
Attorney for Defendants-Respondents

SO ORDERED:

BB

Order of Affirmance

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on the 3rd day of November, 1966.

Present:

Hon. Charles D. Breitel,		Justice Presiding
Hon. Benjamin J. Rabin,	)	
Hon. Harold A. Stevens,	)	Justices
Hon. Louis J. Capozzoli,	)	
Hon. Earle C. Bastow,	)	

10763

In the Matter of the Application of

GEORGE CAMPBELL PAINTING CORP.,

Petitioner-Appellant,

against

WILLIAM REID, FRANCIS V. MADIGAN, IRA S. ROBBINS, members of the New York City Housing Authority, THE NEW YORK CITY HOUSING AUTHORITY,

Respondents-Respondents,

For a Review pursuant to Article 78 of the Civil Practice Law and Rules.

An appeal having been taken to this Court by the petitioner-appellant from the order and judgment (one paper)

Order of Affirmance

of the Supreme Court, New York County, entered on January 10, 1966, granting respondents' cross-motion to dismiss the petition,

And said appeal having been argued by Mr. Albert A. Blinder of counsel for the appellant, by Mr. Paul W. Hessel of counsel for respondents-respondents, by Mr. Robert E. Hugh of counsel for Hon. Louis J. Lefkowitz, Attorney General of the State of New York, appearing pursuant to Executive Law, §71, and a brief amicus curiae having been filed on behalf of the District Attorney, New York County; and due deliberation having been had thereon,

It is unanimously ordered and adjudged that the order and judgment (one paper) so appealed from be and the same is hereby, in all things, affirmed; and that the respondents recover of the appellant $50 costs and disbursements of this appeal.

Enter:

Hyman W. Gamso
Clerk.

Opinion of the Appellate Division

275 N.Y.S. 2d 363 (not officially reported)

Order and judgment (one paper) unanimously affirmed, with $50 costs and disbursements to the respondents. No opinion. Order filed.

Remittitur from Court of Appeals

No. 115

COURT OF APPEALS

STATE OF NEW YORK, SS:

PLEAS in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 7th day of July in the year of our Lord one thousand nine hundred and sixty-seven, before the Judges of said Court.

Witness,

The Hon. STANLEY H. FULD, Chief Judge, *Presiding.*

RAYMOND J. CANNON, *Clerk.*

Remittitur July 7, 1967

1. No. 115 67

In the Matter of the Application of

George Campbell Painting Corp.,

Appellant,

vs.

William Reid, & ors., &c., & ano.,

Respondents,

For a Review &c.

BE IT REMEMBERED, That on the 12th day of March in the year of our Lord one thousand nine hundred and sixty-seven, George Campbell Painting Corp., the appellant in

this cause, came here unto the Court of Appeals, by Ruzow & Lipner, its attorneys, and filed in the said Court a return thereto from the order of the Appellate Division of the Supreme Court in and for the First Judicial Department. And William Reid, & ors., &c., & ano., the respondents in said cause, afterwards appeared in said Court of Appeals by Harry Levy, their attorney.

Which said return thereto, filed as aforesaid, are hereunto annexed.

WHEREUPON, The said Court of Appeals having heard this cause argued by Mr. Albert A Blinder, of counsel for the appellant, and by Mr. Paul W. Hessel, of counsel for the respondents, and by Mr. Samuel A. Hirshowitz, of counsel for the Attorney General, brief filed by amicus curiae, and after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court herein be and the same hereby is affirmed, with costs.

And it was also further ordered that the records aforesaid, and the proceedings in this Court, be remitted to the Supreme Court of the State of New York, there to be proceeded upon according to law.

THEREFORE, it is considered that the said order be affirmed, with costs, as aforesaid.

And hereupon, as well the return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according

to law, and which record now remains in the said Supreme Court, before the Justices thereof, &c.

RAYMOND J. CANNON
Clerk of the Court of Appeals
of the State of New York

Court of Appeals, Clerk's Office,
Albany, July 7, 1967.

[SEAL]

I HEREBY CERTIFY, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

RAYMOND J. CANNON
Clerk.

Opinion of Court of Appeals, State of New York

20 N. Y. 2d 370

283 N.Y.S. 2d 31

229 N.E. 2d 602

STATE OF NEW YORK

COURT OF APPEALS

[SAME TITLE]

PER CURIAM:

This is an action to nullify a determination of the New York City Housing Authority disqualifying the appellant corporation from bidding on future contracts with the Authority. In addition the appellant seeks an injunction against the Authority's enforcement of its decision. The disqualification is mandated by Public Authorities Law §2601 since the appellant's former president appeared before a grand jury investigation bid-rigging and refused to sign a waiver of immunity.

We hold that section 2601 of the Public Authorities Law is constitutional (*Matter of Gardner* v. *Broderick*, 20 N Y 2d 227, 282 N Y S 2d 487, 229 N.E. 2d 184, decided herewith) and that the disqualification imposed on the appellant corporation is valid. The fact that the appellant's officer resigned his position and that the resignation was accepted prior to his appearance before the grand jury and his refusal to sign a waiver of immunity is not controlling. Where the termination of the relationship of the individual officer with the corporation occurs almost contemporaneously with his refusal to sign a waiver of immunity or where it is obvious that the resig-

nation was tendered and accepted solely for the purpose of avoiding the statutory disqualification, the person so resigning or otherwise departing shall be deemed to have acted in his capacity as a corporate officer when he refused to sign the waiver.

There may be times when the statute will operate to penalize a corporation which had severed its connection with the recalcitrant officer and which has otherwise been cooperative. The Legislature has, however, recognized this problem and has specified a procedure by which the disqualification can be removed under such circumstances. (Public Authorities Law §2603). The appellant's exclusive remedy is the procedure outlined in that statute.

The orders of the Appellate Division should be affirmed with costs.

FULD, C.J., and VAN VOORHIS, BURKE, SCILEPPI, BERGAN and KEATING, JJ., concur.

BREITEL, J., taking no part.

Orders affirmed.

Notice of Appeal to the Supreme Court of the United States

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

Index No. 6987/65

In the Matter of the Application of

GEORGE CAMPBELL PAINTING CORP.,

Petitioner-Appellant,

against

WILLIAM REID, FRANCIS V. MADIGAN, IRA S. ROBBINS, members of the New York City Housing Authority, THE NEW YORK CITY HOUSING AUTHORITY,

Respondents-Appellees.

For a Review pursuant to Article 78 of the Civil Practice Law and Rules.

I. Notice is hereby given that GEORGE CAMPBELL PAINTING CORP., the appellant above named, hereby appeals to the Supreme Court of the United States from the final judgment of the Court of Appeals affirming the dismissal of appellant's petition entered in this action on July 7, 1967.

This appeal is taken pursuant to 28 U.S.C. §1257(2).

II. The clerk will please prepare a transcript of the entire record in this cause, for transmission to the Clerk

of the Supreme Court of the United States, and include in said transcript the following:

1. Remittitur dated July 7, 1967 from the Court of Appeals.
2. Opinion of the Court of Appeals.
3. Order granting permission to appeal to the Court of Appeals.
4. Order of the Appellate Division.
5. Opinion of the Appellate Division.
6. Notice of Appeal to the Appellate Division.
7. Order and Judgment of Special Term.
8. Notice of Petition.
9. Petition and Exhibits "A"—"G" annexed thereto.
10. Notice of Respondent's cross motion.
11. Opinion of Tilzer, J.
12. Stipulation as to prior proceedings.

III. The following questions are presented by this appeal:

1. Is the 14th Amendment offended by New York State's Public Authorities Law, §2602, which disqualifies a corporation from eligibility to bid on public contracts if one of its officers or directors asserts his privilege against self incrimination when called before a grand jury?

a) If not, does the fact that the recalcitrant witness resigned his office and surrendered his

control of the company's affairs prior to being called as a witness make a difference?

2. Is New York State's statutory requirement, Public Authorities Law §2601, that all public contracts contain an agreement to waive the privilege against self incrimination an unconstitutional condition of doing business with the state and its agencies?

RUZOW & LIPNER
Attorneys for Petitioner-Appellant
Office & Post Office Address:
122 East 42nd Street
Borough of Manhattan
City of New York

To:

CLERK, Supreme Court of the State of New York
County of New York

HARRY LEVY
Attorney for Respondents-Appellees
250 Broadway
New York, New York

LOUIS J. LEFKOWITZ
Attorney General of the State of
New York appearing pursuant to
Executive Law #71
Albany, New York 12224

Order Noting Probable Jurisdiction

SUPREME COURT OF THE UNITED STATES

No. 673 ....., October Term, 1967

GEORGE CAMPBELL PAINTING CORP.,

Appellant,

v.

WILLIAM REID, et al.

APPEAL from the Court of Appeals of the State of New York.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted. The case is placed on the summary calendar and set for oral argument immediately following No. 635.

January 29, 1968

Order to Show Cause

At a Special Term, Part II of the Supreme Court of the State of New York held in and for the County of New York at the Courthouse thereof, 60 Centre Street, Borough of Manhattan, City and State of New York, on the 7th day of January, 1966.

Present:

HON. GEORGE TILZER, Justice

[SAME TITLE]

Upon the annexed affidavit of George Morvan, sworn to January 6th, 1966, and the annexed complaint, verified January 6th, 1966, and good cause shown therefor, let the defendants or their attorneys show cause before this Court at a Special Term, Part I, to be held in the County Courthouse, 60 Centre Street, New York, New York, on the 12th day of January, 1966, at 9:30 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, why an Order should not be made and entered herein enjoining defendants *pendente lite* from barring or disqualifying plaintiff from future bidding and directing the restoration of its name to the qualified bidders list or, alternatively, directing that the issues raised herein be set down for an immediate trial, and for such other and further relief as to this Court may seem just and proper; and it is further

ORDERED, that service of a copy of this Order and the papers upon which it is granted upon defendants on or before January 10, 1966, at or about 10 A.M. shall be deemed good and sufficient service thereof.

Enter

G. T.
Justice of the Supreme Court
of the State of New York

Affidavit of George Morvan in Support of Motion

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

[SAME TITLE]

State of New York)
County of New York) ss.:

GEORGE MORVAN, being duly sworn, says:

1. I am the president of the plaintiff corporation and make this affidavit in support of its motion for a temporary injunction.

2. For more than thirty years and until the actions complained of herein, the plaintiff was one of the largest and most reputable painting contractors in the United States. In the last six years in the State of New York alone, plaintiff performed over Five Million Dollars of painting services for New York City and State Agencies.

3. Among others, plaintiff has provided services to the New York City Housing Authority, Department of Public Works, Parks, Department of Sanitation, Board of Education, Department of Hospitals, D. W. S. G. & E., The Port of New York Authority, the New York City Transit Authority and the New York State Department of Public Works.

4. In addition, plaintiff has enjoyed a substantial business reputation throughout the country in both public and private ventures. Some of the major contracts undertaken and completed satisfactorily by the plaintiff during the

last ten years are listed in paragraph "7" of the verified complaint annexed hereto. The list is impressive and the company takes pride in its accomplishments.

5. Because of certain actions taken by defendants, more fully set forth below, plaintiff finds itself disgraced in the business community, barred from submitting bids to public agencies in this State, and, as a result, has similarly been barred by public agencies in other States.

6. The reverberation of plaintiff's disqualification has also been felt in plaintiff's non-public business sphere.

7. Defendants purported to act under Section 38 of the amendments to General Conditions of Contract Nos. PD65-5A (McKinley, Morris & Morrisania); PD65-10C (First & Riis [F & C]); and PD65-14B (Lehman & Taft), between plaintiff and defendants, the contract provision inserted pursuant to Section 2601 of the Public Authorities Law which provides a five year disqualification from bidding on public contracts to any person who refuses when duly requested, to sign a "Waiver of Immunity". Further, any firm or corporation of which such person is a partner, member, officer or director is similarly disqualified.

8. Defendants' claim that the refusal of George Campbell, Jr. to sign a "Waiver of Immunity" on April 13, 1965, thereby results in the disqualification of plaintiff, even though George Campbell, Jr. was not then an officer, director or stockholder of the plaintiff corporation.

9. On or about March 26, 1965, George Campbell, Jr., who, upon the death of George Campbell, Sr. in August, 1964, assumed the presidency of plaintiff, became aware of the pendency of an investigation by the Grand Jury

which promised to encompass numerous contracts between plaintiff and various New York City Agencies.

10. Both George Campbell, Jr. and all of the other officers and members of the Board of Directors of plaintiff, including your deponent, were advised by counsel that they could expect to be subpoenaed and requested to waive statutory immunity.

11. We were further advised by counsel of the penalties that would result if any of us refused to waive immunity. Counsel laid special emphasis on the fact that if for any personal reason any of the officers or directors of the plaintiff did not deem it in his or her interest to waive immunity, that it was their duty to inform the Board and suitable arrangements made for their resignation because of the conflict between their personal interest and the plaintiff's best interest.

12. Of all of the officers and directors of plaintiff, only George Campbell, Jr., then only twenty-four years of age, and having the fewest years of service with the company, deemed it advisable to refuse to waive immunity, and he was therefore requested to and did resign. He also disposed of his stock in plaintiff.

13. On April 9, 1965, the Board of Directors of plaintiff met and accepted the resignation of George Campbell, Jr. (Exhibit "A" annexed hereto), and a letter was sent to defendants so informing them (Exhibit "B" annexed hereto).

14. Upon information and belief, the aforesaid Grand Jury met on April 13, 1965, George Campbell, Jr. was subpoenaed to testify, refused to sign a "Waiver of Immunity", and defendants were so informed in due course.

15. On April 20, 1965, your deponent, and upon information and belief, other officers and directors of plaintiff, appeared before the aforesaid Grand Jury and, when asked, signed "Waivers of Immunity" and testified.

16. The following day plaintiff received from defendants a notice of disqualification (Exhibit "C" annexed hereto).

17. By letter, hand delivered, on April 23, 1965 (Exhibit "D" annexed hereto), counsel for plaintiff attempted to disabuse defendants of the numerous factual errors contained in their notice of disqualification, the most significant of which was the fact that the said George Campbell, Jr. was not an officer or director of plaintiff as defendants' notice alleged.

18. I am informed by counsel that defendants have taken the position that under Section 38 of the General Conditions of the aforesaid contracts between plaintiff and defendants and under Section 2601 of the Public Authorities Law, so long as George Campbell, Jr. was an officer or director when the contract was made, his resignation prior to his refusal to waive immunity is meaningless.

19. I am informed by counsel that the interpretation placed on the contracts and statute by defendants is clearly erroneous as the annexed Memorandum of Law amply demonstrates.

20. I am informed and believe that within the next thirty to sixty days, several millions of dollars of work will be offered for bid by public agencies in this city and state, for which plaintiff is eminently qualified to bid and perform.

Affidavit of George Morvan

21. Plaintiff sought the relief requested herein by proceeding under Article 78 of the C. P. L. R. for a review of defendants' determination. This Court held that the proper method for obtaining a review of defendants' acts is by a plenary action (New York Law Journal, December 6, 1965, page 18, Tilzer, J.).

22. Aside from the Article 78 proceeding, no previous request for the relief requested herein has been made to this or any other court.

23. No previous application for the relief asked for in this application.

George Morvan

(Sworn to January 6, 1966.)

Exhibit A Annexed to Morvan Affidavit

MINUTES OF A SPECIAL MEETING OF BOARD OF DIRECTORS

GEORGE CAMPBELL PAINTING CORP.,

A special Meeting of the Board of Directors of George Campbell Painting Corp. was held on the 9th day of April, 1965 at 10:30 AM o'clock in the offices of Ruzow and Lipner, 501 Fifth Avenue, New York City.

The following were present:

George Morvan	Jane Jesinsky
Marian Rizzi	Elizabeth Campbell
Anita Ponte	Theodore M. Ruzow

Theodore M. Ruzow served as Acting Chairman and called the meeting to order.

The Acting Chairman presented the resignation of George Campbell, Jr., as President and Director of George Campbell Painting Corp. dated March 26, 1965, and also surrendered Stock Certificate #6 in the amount of 10 shares transferred to George Campbell Painting Corp. to the Directors of George Campbell Painting Corp. at the meeting.

On motion duly made, seconded and unanimously carried, it was

> RESOLVED, that committee be elected to select a president. The committee to be Elizabeth Campbell, Jane Jesinsky, Anita Ponte, with Marian Rizzi as Secretary to the Committee.
>
> RESOLVED, that the Committee would give their report in thirty (30) days.

There being no further business before the meeting, the same was, on motion, duly adjourned.

Dated: April 9, 1965

Marian Rizzi
Secretary

Exhibit A Annexed to Morvan Affidavit

Letter of Resignation Annexed to Exhibit A

March 26, 1965

To The Board of Directors
George Campbell Painting Corp.

I hereby resign as Director and President of George Campbell Painting Corp. effective immediately.

George W. Campbell, Jr.

Witness:

Theodore M. Ruzow
Harry Lipner

Exhibit B Annexed to Morvan Affidavit

Letter

[LETTERHEAD OF]

GEORGE CAMPBELL PAINTING CORP.
P. O. Box 631, 40-11 149th St.,
Flushing, N. Y. 11352

April 9, 1965

New York City Housing Authority
250 Broadway
New York, New York 10007

Gentlemen:

Please be advised that George Campbell, Jr. resigned as an officer and director of our corporation on March 26, 1965.

Very truly yours,

GEORGE CAMPBELL PAINTING CORPORATION

Marian Rizzi,
Secretary

Exhibit C Annexed to Morvan Affidavit

Notice of Disqualification

[LETTERHEAD OF]

NEW YORK CITY HOUSING AUTHORITY
250 Broadway : New York, N. Y. 10007

April 21, 1965

George Campbell Painting Corp.
40-11 149th Street
Flushing 52, New York

Re: Contracts Nos.
PD 65-5A (McKinley, Morris & Morrisania)
PD 65-10C (First & Riis (F & C)
PD 65-14B (Lehman & Taft)

Gentlemen:

The Authority has been officially informed by the District Attorney of New York County that George Campbell, Jr., an officer of your company, has refused to waive immunity when subpoenaed to testify before the Grand Jury of that county in connection with a pending investigation to determine whether the crimes of bid rigging on public contracts, bribery of a public officer, bribery of a labor official, extortion, coercion, assault, and conspiracy to commit each of these crimes, has occurred in New York County.

Please take notice that by reason of the foregoing, and pursuant to the provisions of Section 38 of the General Conditions of the above contracts, the Authority has directed, and you are hereby advised, that such Contracts be and they hereby are cancelled and terminated, effective immediately. You are directed to remove immediately from each of the projects covered by the above Contracts all your materials and equipment.

Exhibit C Annexed to Morvan Affidavit

Please take further notice that in accordance with the further provisions of said Section 38 the Authority has directed, and you are hereby advised, that said George Campbell, Jr., and any firm, partnership or corporation of which he is a member, partner, director or officer, including your company, has been and will be disqualified from selling to or submitting bids to or receiving awards from or entering into any contracts with the Authority for goods, work or services, for a period of five (5) years after such refusal.

Yours very truly,

Gerald J. Carey
General Manager

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Exhibit D Annexed to Morvan Affidavit

Letter

[LETTERHEAD OF]

RUZOW & LIPNER
ATTORNEYS AND COUNSELLORS AT LAW
501 Fifth Avenue
New York 17, N. Y.

April 23, 1965

New York City Housing Authority
250 Broadway
New York, New York 10007

Att. Mr. Gerald J. Carey
General Manager

Re: George Campbell Painting Corp.

Morris Houses, McKinley and
Morrisania Houses
Contract No. PD 65-5A
Amt. of Contract—$80,630.00

First and Riis Houses
Contract No. PD 65-10C
Amt. of Contract—$61,395.00

Lehman Village & Taft Houses
Contract No. PD 65-14B
Amt. of Contract—$8,500.00

Dear Sir:

We are the attorneys for George Campbell Painting Corp. and have been requested to write to you by our client, with regard to the following matter.

On April 9, 1965, a letter was addressed to the Authority advising you that George William Campbell, Jr. had

resigned as an officer and director of their corporation on March 26, 1965, a copy of which is attached herewith.

On April 20, 1965, the employees of George Campbell Painting Corp. were directed to cease their work at the site.

On April 21, 1965, George Campbell Painting Corp. received a requisition, which contained a written statement to the effect that their contract was cancelled April 20, 1965.

On April 21, 1965, the undersigned spoke to Mr. Fitzsimmons of the Legal Department of the New York City Housing Authority and was informed that a letter was in the mail to George Campbell Painting Corp. cancelling the several contracts between the Authority and them, including the above referred to contracts.

Mr. Fitzsimmons further said that this action was taken as a result of information received from the District Attorney of New York County's office and mentioned having received it from Assistant District Attorney Joseph Phillips. At this point in the conversation, the undersigned asked Mr. Fitzsimmons if the Authority had received and had before it, at the time it made the decision to cancel the contracts of George Campbell Painting Corp., the aforesaid letter of April 9, 1965 attached herewith. Mr. Fitzsimmons did not answer the question propounded and I then told him that the letter stated that George William Campbell, Jr. had resigned as an officer and director of George Campbell Painting Corp. on March 26, 1965 and that this was a fact. I also informed Mr. Fitzsimmons that a similar communication had been sent to Mr. Joseph Phillips, Assistant District Attorney, on April 9, 1965, giving Mr. Phillips the same information regarding the resignation of Mr. Campbell.

I requested Mr. Fitzsimmons to arrange a hearing or give the contractor and his attorneys some opportunity to present the facts regarding the resignation, because of

their significance relevant to the acts of cancellation of the contracts by the Authority.

On April 23, 1965, George Campbell Painting Corp. received a letter from the Authority formally notifying it of the proposed cancellation of the above referred to contracts.

I direct your attention to Section 38 of the Amendments to General Conditions entitled "Cancellation and Disqualification for Failure to Waive Immunity". It is a fact that George William Campbell, Jr. refused to waive immunity at an appearance before a Grand Jury of New York County on April 14, 1965.

Your attention is directed to Subdivision (a) of Section 38, which clearly speaks in the present tense, when it refers to the disqualification of the person failing to waive immunity and in Subdivision (b), it speaks in the present tense, when it refers to the right of the Authority to cancel existing contracts as a result of the relationship between the person failing to waive immunity and the corporation under contract with the Authority.

It is respectfully submitted that if George William Campbell, Jr. resigned as an officer, director and stockholder prior to his being called upon to waive immunity and prior to his failure to waive immunity, that the provisions of Section 38 have no application and should not be applied or enforced by the Authority, with relation to any contracts existing between the Authority and George Campbell Painting Corp.

Please be advised that all officers and directors of George Campbell Painting Corp., who have been requested to appear before the New York County Grand Jury have voluntarily appeared, without subpoena, and have voluntarily signed waivers of immunity.

Exhibit D Annexed to Morvan Affidavit

As time is of the essence and great and irreparable harm and damages are accruing hourly to George Campbell Painting Corp., this letter is being hand-delivered to your office, to request an immediate hearing by the Authority with regard to the cancellation of the contracts and the application of Section 38 thereto and the related question of the resignation of George William Campbell, Jr. as an officer, director and stockholder of George Campbell Painting Corp.

Very truly yours,

RUZOW & LIPNER

By

TMR;ag
Enc. Copy of letter of
George Campbell Painting Corp.
dated April 9, 1965

DELIVERED BY HAND

Summons in Support of Motion

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

[SAME TITLE]

Plaintiff designates New York County as the place of trial.

The basis of the venue is Defendants' residence.

Plaintiff resides at 40-11 149th Street, Flushing, County of Queens.

To the above named Defendants

YOU ARE HEREBY SUMMONED to answer the complaint in this action and to serve a copy of your answer, or, if the complaint is not served with this summons, to serve a notice of appearance, on the Plaintiff's Attorneys within 20 days after the service of this summons, exclusive of the day of service (or within 30 days after the service is complete if this summons is not personally delivered to you within the State of New York); and in case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Dated, January 7, 1966.

RUZOW & LIPNER
Attorneys for Plaintiff

Verified Complaint in Support of Motion

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

[SAME TITLE]

Plaintiff, George Campbell Painting Corp., by its attorneys, Ruzow & Lipner, complaining of defendants, respectfully alleges:

1. Defendants William Reid, Francis V. Madigan and Ira S. Robbins, respectively, are Chairmen and members of the New York City Housing Authority. Defendant, The New York Housing Authority, is a Public Authority, duly constituted under the New York City Housing Authority Law.

2. Plaintiff is a corporation duly organized under the Laws of the State of New York, with its principal place of business at 40-11 149th Street, Flushing, New York.

3. Plaintiff is in the business of general painting, contracting, and among other things has engaged in painting and decorating contracts for the defendant, The New York City Housing Authority.

4. Plaintiff corporation was organized in 1964 with the Estate of George Campbell, Sr. owning fifty percent of the stock therein, and the remaining fifty percent owned equally by George Campbell, Jr., Marian Campbell Rizzi, Anita Campbell Ponte, Jane Campbell Jesinsky and Barbara Campbell Dougherty.

5. Prior thereto, the business was conducted as a partnership, "George Campbell & Company". The stockhold-

ers of plaintiff were members of the partnership with the same ownership interest. At all times during his lifetime, George Campbell, Sr. was the general partner in charge of the partnership.

6. For a period of thirty years plaintiff has been engaged in general painting contracting for defendant, The New York City Housing Authority, and other Governmental agencies, and subdivisions within the State of New York and elsewhere. At no time during that period had any of its contracts been cancelled or had it been barred from future bidding because of the provisions of Section 2601 or 2602 of the Public Authorities Law, or the provisions of Section 103 of the General Municipal Law, or any other corresponding provisions of State or Federal Law.

7. During the past thirty years plaintiff has been one of the largest painting contractors in the area. Its reputation for public service contracts has been the highest. Among the major contracts undertaken and satisfactorily completed by the plaintiff during the last ten years have been:

Consolidated Edison, New York

New York City Housing Authority

New York City Department of
- Public Works
- Parks
- Sanitation
- Board of Education
- Hospitals
- D. W. S. G. & E.

Port of New York Authority

New York City Transit Authority

New York State Department of Public Works

United States Military Academy, West Point, New York

Oahe Reservoir, Pierre, South Dakota

General Electric Appliance Park, Louisville, Kentucky

Triboro Bridge, New York

Whitestone Bridge, New York

Henry Hudson Bridge, New York

Walt Whitman Bridge, Philadelphia, Pa.

Midhudson Bridge, New York

Memphis Arkinsaw Bridge, Memphis, Tennessee

Ravenwood Generating Plant, New York

Astoria Generating Plant, New York

Mahlstrom Airforce Base, Great Falls, Montana

Scott Airforce Base, Illinois

Loring Airforce Base, Caribou, Maine

New York State Court of Appeals, Albany, New York

Creedmore Hospital, New York

Harlem Valley State Hospital, Pauling, New York

United States Court House, Foley Square, New York

Yeshiva University, New York

Municipal Courts, City of New York

Bronx City Prison, New York

Raymond Street Jail, Brooklyn, New York

Grumman Aircraft Company Plant, Brookhaven, New York

8. Upon the death of George Campbell, Sr. in August 1964, George Campbell, Jr. became the president of plaintiff. George Campbell, Jr. is twenty-four years of age.

9. On March 26, 1965, he resigned as an officer and director of the plaintiff, and on or about that date he divested himself of his stockholdings in the plaintiff. Thereafter he was replaced as president by George Morvan, the former executive vice president of plaintiff. Defendants were informed on April 9th, 1965, by letter, of the aforesaid resignation of George Campbell, Jr.

10. Since March 26, 1965, George Campbell, Jr. has been employed as an estimator by the plaintiff, a position which does not entail any management functions.

11. Plaintiff has no secret agreements with George Campbell, Jr. concerning his future reinstatement or reemployment with plaintiff. He has a ten percent interest in the residue of his father's estate. No distribution has as yet been made to any legatee under the aforesaid estate which is being probated in the Surrogate's Court of Queens County, New York.

12. The aforementioned ten percent undistributed interest in the estate constitutes the only beneficial interest which George Campbell, Jr. now has in plaintiff. Upon the final distribution of the assets of the estate, plaintiff anticipates that George Campbell, Jr. will receive as his share, a monetary payment rather than a distribution in kind of stock in plaintiff now owned by the estate.

13. Thereafter, and on April 13, 1965, at the office of Albert A. Blinder, Esq., 485 Lexington Avenue, New York, New York, a detective of the New York County District Attorney's office served a subpoena upon the aforesaid George Campbell, Jr. calling for his appearance before a Grand Jury on Wednesday, April 14, 1965.

14. On April 14, 1965, George Campbell, Jr. appeared before the Grand Jury and refused to sign a Waiver of Immunity.

15. Upon information and belief, the New York County District Attorney, Frank S. Hogan, advised defendant, The New York City Housing Authority, of the refusal of George Campbell, Jr. to sign a Waiver of Immunity.

16. Upon information and belief, as a result of the aforesaid advice, the defendants determined to and did cancel the then existing contract between plaintiff and defendant The New York City Housing Authority, purporting to act pursuant to Section 38 of the General Conditions of Contracts. Said Section 38 is the provision incorporated therein by reason of the mandate of Section 2601 of the Public Authorities Law.

17. In addition, and upon information and belief, similarly purporting to act under Section 38 of the General Conditions of Contracts between plaintiff and defendant, The New York City Housing Authority, the defendants barred plaintiff from future bidding with defendant, The New York City Housing Authority, for a period of five years.

18. On or about April 21, 1965, by letter, defendants notified plaintiff of the aforesaid cancellation and disqualification.

19. Thereafter, plaintiff, by its attorneys, informed defendants by letter dated April 23, 1965, re-notifying defendants of the fact that George Campbell, Jr. was not an officer or director of the plaintiff at the time he refused to waive immunity before the Grand Jury, and further notifying the defendants that all of the officers and directors of the plaintiff (including George Morvan, the plaintiff's president) who were requested to appear before the Grand Jury and were requested to sign Waivers of Immunity did so voluntarily without subpoena and signed such Waivers of Immunity.

20. On or about May 5, 1965, defendant, The New York City Housing Authority rejected plaintiff's argument and thereafter a Notice of Claim was filed against The New York City Housing Authority claiming One million and 00/100 ($1,000,000.00) dollars in damages, together with the claim that its contract should be reinstated and the order barring it from future bidding vacated and cancelled. A copy of this Notice of Claim is annexed hereto as Exhibit A. More than thirty days have elapsed since the Notice of Claim was served, and since the depositions, pursuant to Section 157(3) of the Public Housing Law was concluded by the defendant, The New York City Housing Authority.

21. Plaintiff, to the knowledge of its officers and directors, denies that it has engaged in any practices illegal under any State or Federal Law, or under City ordinances or regulations.

22. During the six year period from 1959 until the defendants' disqualification of plaintiff in 1965, plaintiff did an average yearly business of $1,085,912.00 with New York City and New York State Agencies and with the Consolidated Edison Company, all of whom have refused

to accept bids from plaintiff as a result of the defendants' action.

23. In addition, the chief of the Bureau of Contract Administration for the State Highway Department of the State of New Jersey, on September 29, 1965, wrote to the plaintiff as follows:

> "We are returning your Contractor's Financial and Equipment Statement as of the close of business on August 31, 1965, as we have on file in this office information that your firm was banned by executive order number 138 of the Mayor of New York until April 27, 1970.
>
> "It will not be possible for your organization to qualify with our Department until this date has been reached or this executive order has been cancelled."

24. As a direct result of defendants' action, plaintiff will lose countless opportunities to bid upon contracts with public agencies throughout the United States, not to mention the incalculable loss of non-public business opportunities.

25. The damage suffered and to be suffered in the future by plaintiff is incalculable. Even after the five year ban will have come to an end, plaintiff's reputation will have been irreparably injured by defendants' actions.

26. Plaintiff has no adequate remedy at law.

WHEREFORE, plaintiff demands a judgment permanently enjoining defendants from continuing to disqualify the plaintiff as aforesaid, together with the costs of this action.

RUZOW & LIPNER
Attorneys for Plaintiff

(Verified by George Morvan, Jan. 6, 1966.)

Exhibit A Annexed to Verified Complaint

Notice of Claim

In the Matter of the Claim of

GEORGE CAMPBELL PAINTING CORP.

against

THE NEW YORK CITY HOUSING AUTHORITY

SIRS:

TAKE NOTICE that the undersigned GEORGE CAMPBELL PAINTING CORP., with its principal place of business at 40-11 149th Street, Flushing, County of Queens, New York, claims:

(1) Damages against The New York City Housing Authority in the sum of One Million ($1,000,000.00) Dollars,

(2) A right to have its cancelled contracts with The New York City Housing Authority reinstated, and

(3) The order barring it from future bidding for a period of five (5) years vacated, because of The New York City Housing Authority's wrongful interpretation and application of the provisions of the contract entered into by and between George Campbell Painting Corp. and The New York City Housing Authority and the applicable statutes.

The damages, wrongful cancellation of the contracts and wrongful barring of the claimant from future bidding for a period of five (5) years were sustained as a result of

the action by The New York City Housing Authority purportedly pursuant to provisions of the contract and applicable statutes claiming a violation thereof by a member, partner, director or officer of the claimant refusing to sign a waiver of immunity. The New York City Housing Authority in making the determination of cancelling the existing contracts and barring petitioner from future bidding for five (5) years for the alleged refusal of George Campbell, Jr. to waive immunity before the New York Grand Jury, was a breach of contract and violated the claimant's rights and was based upon the erroneous information and/or interpretation of the aforesaid contracts and statutes in that the aforesaid George Campbell, Jr. was no longer an officer, director or stockholder of the petitioner at the time he refused to waive immunity before the Grand Jury, and, moreover, was not an officer, director or stockholder at the time a subpoena was served upon him for his appearance as aforesaid. The decision by The New York City Housing Authority was arrived at despite the fact that they were informed by letter dated April 9, 1965 that George Campbell, Jr. was no longer an officer and director of the corporation.

The undersigned, George Campbell Painting Corp., claims damages in the sum of One Million ($1,000,000.00) Dollars for loss of profits on contracts they were prevented from obtaining because of said wrongful determination by The New York City Housing Authority.

TAKE FURTHER NOTICE that the undersigned, George Campbell Painting Corp., hereby presents its claims as aforesaid respectively for adjustment, reinstatement, vacature of the existing prohibition and payment, and notifies you that unless the same are adjusted, reinstated, vacated and paid within thirty (30) days from the date of their presentation to you, it is the intention of the undersigned to commence an action or actions, a proceeding or proceedings

thereon in the Supreme Court of the State of New York, County of New York, against The New York City Housing Authority and its members for the relief sought herein, with costs and disbursements in the action or actions, proceeding or proceedings as aforesaid.

Dated: Flushing, New York
July 2, 1965

GEORGE CAMPBELL PAINTING CORP.
By Marian C. Rizzi

State of New York)
County of Queens) ss.:

On this 2nd day of July 1965, before me personally came Marian C. Rizzi, to me known, who, being duly sworn, did depose and say, that she resides at 55 Rose Drive, Great Neck, New York; that she is the Secretary of George Campbell Painting Corp., the corporation described in and which executed the foregoing instrument; that she knows the seal of said corporation, that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the board of directors of said corporation, and that she signed her name thereto by like order.

Harry Lipner
Notary Public

HARRY LIPNER
Notary Public State of New York
No. 41-7564430 Queens County
Term Expires March 30, 1966

Exhibit A Annexed to Verified Complaint

State of New York)
County of Queens) ss.:

MARIAN C. RIZZI, being duly sworn, deposes and says:

That she is the Secretary of George Campbell Painting Corp., the corporation named in the within Notice of Claim; that she has read the foregoing Notice of Claim and knows the contents thereof; and that the same is true to her own knowledge, except as to the matters therein stated to be alleged upon information and belief and as to those matters, she believes it to be true.

Deponent further says that the reason this verification is made by deponent and not by George Campbell Painting Corp. is because the said George Campbell Painting Corp. is a domestic corporation and deponent is an officer thereof, to wit, its Secretary.

Marian C. Rizzi

Sworn to before me this
2nd day of July 1965

HARRY LIPNER
Notary Public State of New York
No. 41-7564430 Queens County
Term Expires March 30, 1966

Notice of Cross Motion

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

Index No. 247/1966

[SAME TITLE]

Sirs:

PLEASE TAKE NOTICE, that upon the annexed affidavit of Paul W. Hessel, sworn to the 31st day of January, 1966, and all the papers, documents and exhibits thereto annexed and therein referred to, plaintiff's motion for an injunction *pendente lite*, brought on by Order to Show Cause dated January 7, 1966, and the complaint herein, a cross motion will be made by the defendants pursuant to Rule 2215 of the Civil Practice Law and Rules, upon the argument of plaintiff's said motion for an injunction *pendente lite*, returnable at a Special Term, Part I, of this Court, to be held in and for the County of New York, at the Courthouse, 60 Centre Street, in the Borough of Manhattan, City, County and State of New York, on February 15, 1966, at 9:30 in the forenoon of that day or as soon thereafter as counsel can be heard, for judgment, dismissing the complaint herein pursuant to:

1. CPLR 3211 (a) 1. on the ground that one or more complete defenses to the cause of action alleged in the complaint have been established by documentary evidence.

2. CPLR 3211 (a) 2. on the ground that the Court has not jurisdiction of the subject matter of this

action in that plaintiff has available another exclusive and adequate remedy provided by law for the relief demanded in the complaint.

3. CPLR 3211 (a) 4. on the ground that there is another proceeding pending between these parties for the same cause of action alleged in the complaint herein.

4. CPLR 3211 (a) 7. on the ground that the complaint fails to state facts sufficient to constitute a cause of action.

AND for such other and further relief as to the Court may seem just and proper.

PLEASE TAKE FURTHER NOTICE that pursuant to 2214 (b) CPLR you are required to serve any answering affidavits in opposition to this cross motion at least five (5) days before the return date hereof.

Dated: New York, N. Y., January 31, 1966.

Yours, etc.

Harry Levy
Attorney for Defendants.

To:

Ruzow & Lipner, Esqs.,
Attorneys fo Plaintiff
Albert A. Blinder, Of Counsel

Affidavit of Paul W. Hessel in Opposition to Motion and in Support of Cross Motion

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

Index No. 247/1966

[SAME TITLE]

State of New York)
County of New York) ss.:

PAUL W. HESSEL, being duly sworn, deposes and says:

1. I am an attorney at law and Deputy Counsel of the New York City Housing Authority (hereinafter referred to as the "Authority"), the defendant above named, and am associated as such with Harry Levy, Counsel to the Authority and its attorney of record herein. I am fully familiar with all of the facts relating to the subject matter of this action, having personally handled all of the prior proceedings in this Court with respect thereto hereinafter referred to. I make this affidavit upon my own knowledge of the facts herein set forth, based upon the papers and proceedings had in such proceedings, and upon documents, data and records of the Authority available to me.

2. This affidavit is submitted in opposition to plaintiff's motion for an injunction *pendente lite* and such other relief as is set forth in the Order to Show Cause herein; and in support of defendant's cross motion to dismiss plaintiff's complaint contained in the foregoing Notice thereof.

3. This is the third litigation instituted by this plaintiff in this Court for substantially the same relief as is

sought by the complaint and the present motion in this action. The first was brought on by petition verified May 4, 1965 wherein, in addition to the Authority, there were named as parties respondent the Attorney General of the State of New York and the District Attorney of New York County. Two "proceedings" were therein alleged: first, an Article 78 proceeding, and second, a proceeding "—pursuant to Section 103 (c) of the General Municipal Law and Article 4 of the Civil Practice Law and Rules." The relief sought was annulment "—of the determination of the respondents cancelling petitioner's contracts with the New York City Housing Authority and barring it from future bidding for a period of five (5) years—". Plaintiff on its own motion voluntarily discontinued the proceeding pursuant to Section 103 (c) of the General Municipal Law. The Article 78 proceeding was dismissed by this Court for failure of petitioner to file with the Authority, as a condition precedent thereto, a Notice of Claim pursuant to Section 157 of the Public Housing Law, but with leave to renew.

4. Plaintiff having served the Notice of Claim referred to in paragraph "20" of its complaint herein and annexed thereto as Exhibit A, it instituted a second litigation pursuant to Article 78 CPLR by petition verified October 2, 1965. This time it omitted the demand for reinstatement of its cancelled contracts, and sought only an annulment of the determination barring it from future bidding upon Authority contracts for a period of five years. This proceeding was also dismissed by this Court on motion of the Authority, without prejudice to petitioner commencing a plenary action for the same or similar relief. Plaintiff has served a Notice of Appeal to the Appellate Division from the judgment entered thereon, and this appeal is now pending.

5. The proceedings described in the foregoing paragraphs 3 and 4 are on file in this Court under Index No.

6987-1965. The papers therein will be requisitioned for the information of the Court in connection with the present motion and cross motion, and are hereby referred to and submitted as part of the documentary evidence upon which the branch of the cross motion under CPLR 3211 (a) (1) is based. From such papers, and the additional documentary evidence annexed as Exhibits hereto or hereinafter referred to, the further facts relevant to this present litigation are as set forth below.

6. Plaintiff is a major painting contractor who, after public bidding as required by the Public Housing Law, entered into three written contracts with the Authority prior to March 26, 1965 for maintenance painting of its public housing projects. Such contracts are specified in paragraph "7" of plaintiff's moving affidavit of George Morvan. They are hereby referred to and submitted as if annexed as Exhibits hereto.

7. The bids for each of such contracts, the contracts themselves, and the Performance and Payment Bonds made part thereof, were executed and acknowledged on behalf of plaintiff by one George Campbell, Jr. as its president, and otherwise expressly set forth therein that said George Campbell, Jr. was at the time of such execution the president of plaintiff.

8. Plaintiff was then and now is basically a family corporation, fifty percent of whose stock is owned by the estate of said George Campbell, Jr.'s late father (of which estate George Campbell, Jr. is a beneficiary). The remaining fifty percent was, at the time of the execution of said contracts and up to at least April 9, 1965, owned by said George Campbell, Jr. and his sisters.

9. At the time of the execution of said contracts said George Campbell, Jr. was also a director of plaintiff, and continued as such until at least March 26, 1965.

10. Each of such contracts contained the following standard provisions set forth in Section 38 of the Amendments to the General Conditions thereof:

> "38. *Cancellation and Disqualification for Failure to Waive Immunity*
>
> Upon the refusal by a person, when called before a Grand Jury to testify concerning any transaction or contract had with the State, any political subdivision thereof, a public authority or with any public department, agency or official of the State or of any political subdivision thereof or of a public authority, to sign a waiver of immunity against subsequent criminal prosecution or to answer any relevant question concerning such transaction or contract.
>
> A. Such person and any firm, partnership, or corporation of which he is a member, partner, director or officer shall be disqualified from thereafter selling or submitting bids to or receiving awards from or entering into any contracts with the Authority for goods, work or services, for a period of five (5) years after such refusal, and
>
> B. This Contract and any and all other contracts made with the Authority on or after July 1, 1959, by such person and by any firm, partnership or corporation of which he is a member, partner, director or officer may be cancelled or terminated by the Authority, without incurring any penalty or damages on account of such cancellation or termination, but mon-

ies owing by the Authority, for goods delivered or work done prior to the concellation or termination shall be paid."

11. Like other standard provisions of such public contracts required to be incorporated therein by various statutes, this provision was mandated by Section 2601 of the Public Authorities Law, reading as follows:

"2601 *Ground for Cancellation of Contract by Public Authority*

A clause shall be inserted in all specifications or contracts hereafter made or awarded by any publlic authority or by any official of any public authority created by the state or any political subdivision, for work or services performed or goods sold or to be sold, to provide that upon the refusal by a person, when called before a grand jury to testify concerning any transaction or contract had with the state, any political subdivision thereof, a public authority or with any public department, agency or official of the state or of any political subdivision thereof or of a public authority, to sign a waiver of immunity against subsequent criminal prosecution or to answer any relevant question concerning such transaction or contract.

(a) Such person, and any firm, partnership or corporation of which he is a member, partner, director or officer shall be disqualified from thereafter selling to or submitting bids to or receiving awards from or entering into any contracts with any public authority or official thereof, for goods, work or services, for a period of five years after such refusal, and to provide also that

(b) any and all contracts made with any public authority or official thereof, since the effective date of this law, by such person and by any firm, partnership or corporation of which he is a member, partner, director or officer may be cancelled or terminated by the public authority without incurring any penalty or damages on account of such cancellation or termination, but any monies owing by the public authority for goods delivered or work done prior to the cancellation or termination shall be paid."

12. The subsequent Sections 2602 and 2603 of the Public Authorities Law read as follows:

"2602 *Disqualification to Contract with Public Authority*

Any person who, when called before a grand jury to testify concerning any transaction or contract had with the state, any political subdivision thereof, a public authority or with a public department, agency or official of the state or of any political subdivision thereof or of a public authority, refuses to sign a waiver of immunity against subsequent criminal prosecution or to answer any relevant question concerning such transaction or contract, and any firm, partnership or corporation, of which he is a member, partner, director or officer shall be disqualified from thereafter selling to or submitting bids to or receiving awards from or entering into any contracts with any public authority or any official of any public authority created by the state or any political subdivision, for goods, work or services, for a period of five years after such refusal or until a disqualification shall be removed pursuant to the provisions of section twenty-six hundred three of this title.

It shall be the duty of the officer conducting the investigation before the grand jury before which the refusal occurs to send notice of such refusal, together with the names of any firm, partnership or corporation of which the person so refusing is known to be a member, partner, officer or director, to the superintendent of public works of the State of New York and the appropriate departments, agencies and officials of the state, political subdivisions thereof or public authorities with whom the persons so refusing and any firm, partnership or corporation of which he is a member, partner, director or officer, is known to have a contract."

"2603 *Removal of Disqualification of Public Contractors by Petition*

1. Any firm, partnership or corporation which has become subject to the cancellation or termination of a contract or disqualification to contract on account of the refusal of a member, partner, director or officer thereof to waive immunity when called to testify, as provided in sections twenty-six hundred one and twenty-six hundred two of this title, may, upon ten days' notice to the attorney general and to the officer who conducted the investigation before the grand jury in which the refusal occurred, commence a special proceeding at a special term of the supreme court held within the judicial district in which the refusal occurred for a judgment discontinuing the disqualification. Such application shall be in the form of a petition setting forth grounds, including that the cooperation by petitioner with the grand jury at the time of the refusal was such, and the amount and degree of control and financial interest, if any, in the petitioning firm, partnership or

corporation by the member, partner, officer or director who refused to waive immunity is such that it will not be in the public interest to cancel or terminate petitioner's contracts or to continue the disqualification, as provided in section twenty-six hundred one and twenty-six hundred two of this title.

A copy of the petition and accompanying papers shall be served with the notices to be given pursuant to this subdivision.

2. Upon the filing of such petition the court may stay as to petitioner, pending a decision upon the petition, the cancellation or termination of any contracts resulting from such refusal upon such terms as to notice or otherwise as may be just.

3. At least two days prior to the return day, the officer who conducted the investigation before the grand jury and the attorney general may file answers to the petition or apply for judgment dismissing the petition as a matter of law. On or before the return day the petitioner may file a reply to the answer.

4. Upon the return day the court may, upon the petition and answer and other papers filed, forthwith render such judgment as the case requires, or if a triable issue of fact is duly raised, it shall forthwith be tried before a court sitting without a jury or before a referee. The provisions of statute or rule governing references in an action shall apply to a reference under this subdivision.

5. The court shall render judgment dismissing the petition on the merits or discontinuing the disqualification upon the ground that the public interest would be served by its discontinuance, and granting

such other relief as to the cancellation or termination of contracts as may be appropriate, but without costs to petitioner."

13. For some time prior to April, 1965, and thereafter, Hon. Frank S. Hogan, District Attorney of New York County, had been conducting an investigation before a Grand Jury of that County to determine whether the crime of bid rigging on public contracts, among others, had occurred in New York County. Early in April, 1965 said District Attorney so informed the Authority, and further advised that certain individuals who were officers of corporations (other than plaintiff herein) having painting contracts with the Authority had refused to waive immunity and to testify in connection with such investigation.

14. By letter of April 16, 1965 the District Attorney informed the Authority that said George Campbell, Jr., of the plaintiff corporation, had also refused to sign a waiver of immunity before the Grand Jury in such investigation. The letter further stated that it was sent in conformance with Section 103-b of the General Municipal Law, and requested advice as to what action the Authority would take in the matter. A copy of this letter is annexed hereto as Exhibit A.

15. Sections 103-a, 103-b, and 103-c of the General Municipal Law are identical with Sections 2601, 2602 and 2603 of the Public Authorities Law, respectively, except that the former apply to municipal corporations, whereas the latter apply to public authorities such as defendant herein. (In its original proceeding in this matter plaintiff also erroneously referred to the General Municipal rather than the Public Authorities Law, but it was agreed upon the argument that this technicality would be overlooked. In

any event, Section 103-b of the General Municipal Law, as well as Section 2602 of the Public Authorities Law, expressly requires the District Attorney, where such refusal to waive immunity has occurred, to give such notice thereof to public authorities, as well as other governmental agencies).

16. Upon receipt of the District Attorney's letter the Authority cancelled the three painting contracts with plaintiff, and disqualified it, as well as said George Campbell, Jr., and any other firm, partnership or corporation of which he is a member, partner, director or officer, from entering into contracts with the Authority for a period of five years. Plaintiff was so informed by letter of the Authority dated April 21, 1965, a copy of which is annexed to the moving affidavit in the present action as Exhibit B.

17. In its petitions in the prior proceedings plaintiff expressly alleged that the foregoing action of the Authority was taken "—as a result of—" the advice given in said letter of the District Attorney (Exhibit A hereto). A similar assertion is made in paragraphs "16" and "17" of the complaint in this action. And the fact is that the action of the Authority did arise out of and result from such advice in the District Attorney's letter. This point is of importance in the consideration of the nature of the remedy which defendant contends, as hereinafter set forth, is exclusive in these circumstances, and whether, therefore, the present action and motion are tenable.

18. In its petitions in the prior proceedings plaintiff further alleged cooperation by its officers and directors other than George Campbell, Jr. with the District Attorney and the Grand Jury and the limited amount and degree of control and financial interest in plaintiff corporation by said George Campbell, Jr., and asserted that by reason

thereof "—it will not be in the public interest to countenance the disqualification—" (Petition of October 2, 1965, par. "37"). Similar allegations of cooperation are made in the present moving affidavit of George Morvan (par. "15") and the complaint herein (par. "19").

19. It will be noted that allegations of this nature are required in a petition instituting the special proceeding provided for in Section 2603 of the Public Authorities Law set forth in full at par. "12" of this affidavit, above (and its counterpart Section 103-c of the General Municipal Law) for relief from disqualification of a corporation for failure of an officer to waive immunity—which is precisely what is sought in the present action and motion. For emphasis, that portion of Section 2603 setting forth these requirements is now repeated, as follows;

> "—Such application shall be in the form of a petition setting forth grounds, including that the cooperation by petitioner with the grand jury at the time of refusal was such, and the amount and degree of control and financial interest, if any, in the petitioning firm, partnership or corporation by the member, partner, officer or director who refused to waive immunity is such that it will not be in the public interest to cancel or terminate petitioner's contracts or to continue the disqualification—".

20. Defendant respectfully contends that the relief sought by plaintiff in this action and by this motion is expressly provided for in these very circumstances by the procedure set forth in this Section 2603, that it is the exclusive remedy available in such circumstances, that it would afford, if justified, an adequate remedy, and that therefore, on this ground alone, this equitable action cannot be maintained and this motion must be denied. This will be further

treated in a memorandum of law to be submitted on the argument of these motions.

21. Indeed, it will be noted that, as stated in par. "3" of this affidavit, above, the first litigation instituted by plaintiff for the relief now sought by this action did set forth a proceeding under Section 103-c of the General Municipal Law (it was agreed that by inadvertence this was so designated in lieu of its counterpart, Section 2603 of the Public Authorities Law, and that the latter was intended); thereby, and by the allegations of "cooperation" and "public interest" above mentioned, recognizing its applicability to these circumstances. As will further be noted, Section 2603 provides that the only proper parties to that proceeding are the Attorney General and the District Attorney who brought about the disqualification by the public agency concerned. There is no provision for making the public agency itself a party thereto. Why, then, plaintiff voluntarily discontinued that proper proceeding, and thereafter pursued, and continues to pursue the Authority in improper and untenable litigations such as this one, is best known only to it.

22. The refusal of George Campbell, Jr. to waive immunity in the investigation before the Grand Jury, as advised to the Authority by the District Attorney (Exhibit A hereto) is expressly alleged in plaintiff's moving affidavit (par. "14") and complaint (par. "14"). It is also undisputed that he was the president of plaintiff and director and stockholder thereof at the time that plaintiff bid for and executed the three contracts in question, and continued as such at least until March 26, 1965, several weeks before his appearance before the Grand Jury. It is claimed, however, that on March 26, 1965 George Campbell, Jr. resigned as an officer and director of plaintiff, but not until after he and

the other officers and directors were aware of the pending investigation and that therein "—they could expect to be subpoenaed and requested to waive statutory immunity". (Morvan affidavit, par. "10"). The alleged resignation was advised by counsel (Morvan affidavit, par. "11"), and was upon request; and simultaneously "He also disposed of his stock in plaintiff." (Morvan affidavit, par. "12"). The moving affidavit clearly indicates that at the same time, to wit, March 26, 1965, that such advice was given and George Campbell, Jr. was requested to and did resign, "—all of the other officers and members of the Board of Directors of plaintiff—" were present together (see Morvan affidavit, pars. "10" and "11"). Yet singularly, it was not until April 9, 1965, not more than four or five days before George Campbell's refusal to waive immunity, that the Board of Directors of plaintiff met in special meeting, "—and accepted the resignation of George Campbell, Jr." (Morvan affidavit, par. "13").

23. Such purported resignation and surrender of his stock in the plaintiff corporation by George Campbell, Jr. prior to and in anticipation of his being called before the Grand Jury and refusal to waive immunity, is the entire basis for this action and motion. With respect to this, defendants respectfully submit:

(a) That upon the documentary evidence herewith submitted or referred to—principally, this plaintiff's own various petitions, exhibits, affidavits and testimony—as well as other circumstances hereinafter set forth, it is clear that plaintiff has been less than candid with the District Attorney, with this Authority and other public agencies concerned, and, indeed, with this Court, with respect to the circumstances of such purported "resignation" and surrender of stock.

(b) That even if plaintiff's interpretation of the contract and statutory provisions in question were correct—that is, that George Campbell, Jr.'s resignation at any time before his refusal to waive immunity was sufficient to preclude the express sanction of disqualification provided for therein, and thereby to frustrate their plain purpose and intent—such lack of candor, and the other circumstances attending these purported actions, quite clearly indicate that they were not actually effective, or taken in good faith, or both; that plaintiff has not thereby come into this Court with clean hands; and that accordingly this action, in which it seeks equitable relief, should be dismissed and its motion denied on that ground alone.

(c) In any case plaintiff's version of the contract and statutory provisions, upon which it places such complete reliance, is clearly in error. As will be demonstrated in the Memorandum of Law to be submitted herewith, so long as George Campbell, Jr. was an officer and director of plaintiff at the time the bids were submitted and the contracts in question were entered into, the Authority was not only justified, under their express provisions and those of the statute, in cancelling the contracts and disqualifying plaintiff, but it was duty bound to do so immediately upon receiving the advice from the District Attorney that Campbell had refused to waive immunity. And it matters not whether he "resigned" four minutes, or four days, or four weeks before he came before the Grand Jury. As pointed out above, had plaintiff pursued the proper procedure provided by Section 2603 of the Public Authorities Law and therein convinced the Court of the good faith and legitimacy of

such "resignation", and that it should not be held accountable for the actions of its erstwhile principal officer, it might well have obtained appropriate relief. But apparently it is unwilling to subject itself to the probing, in such a proceeding, of the District Attorney (who, with the Attorney General, is the only proper party thereto) on these subjects.

(d) In connection with plaintiff's contention that the contract and statute are to be interpreted so as to preclude the sanctions of cancellation and disqualification where the officer concerned resigned at any time before his refusal to waive immunity, it may interest the Court to know that at least thirteen other major painting contractors of the Authority involved in the same investigation, and who had done millions of dollars of business with the Authority, have similarly had their contracts cancelled and been disqualified under these contract and statutory provisions. Upon information and belief, other public agencies, including the City of New York, have disqualified both these and other contractors. But not one of them has had the temerity so fortuitously to provide for such a "resignation", or to claim that these contractual and statutory provisions could so conveniently be frustrated and nullified thereby.

24. Assuming that plaintiff's interpretation of the contract and statute are nevertheless correct, deponent now proposes to set forth the unassailable evidence above referred to, and which will demonstrate what has been above contended, to wit, that plaintiff's lack of candor herein with respect to the purported resignation and surrender of stock by George Campbell, Jr., and other circumstances attending them, are such that these alleged actions are not worthy of credence, or at least evidence such bad faith and "unclean

hands" that they cannot be made the basis for the equitable relief demanded in this action and by this motion.

25. Plaintiff's moving affidavit (by George Morvan) refers to and annexed as Exhibit A (see par. "13") the purported Minutes of a Special Meeting of plaintiff's Board of Directors held April 9, 1965, five days before George Campbell's appearance before the Grand Jury. As noted above (par. "22" of this affidavit), this was several weeks after the purported resignation of George Campbell, Jr. on March 26, 1965, at which time and place all the directors were apparently present together and immediately available for such a Special Meeting. Although one of the attorneys of record herein was a director of the corporation and present at such Meeting, and is the corporate attorney, these Minutes indicate such desperate haste in their preparation (undoubtedly it was anticipated that at any moment George Campbell would be called before the Grand Jury) that not only are there obvious and elementary omissions in the actions reported therein, but they are clearly inconsistent, in some respects, with statements made by plaintiff's representatives both in the present moving affidavit and elsewhere. Thus:

(a) The Minutes neither contain nor refer to any Waiver of Notice of such Special Meeting.

(b) The Morvan affidavit states (par. "13") that at this Special Meeting "—the Board of Directors met and accepted the resignation of George Campbell, Jr." It will be noted that the Minutes say nothing of such acceptance.

(c) No new president or director was elected to replace the one resigning. The Minutes do state that a committee was appointed to select a new president, and to report in thirty days. However, while George

Morvan presently designates himself in the moving affidavit as the president, and the complaint (par. "9") implies that he became such almost immediately upon the resignation of George Campbell, Jr. on March 26, 1965, it is a fact that as late as October 2, 1965, the corporation was still without a president and George Morvan was still only Executive Vice-President. This appears in par. "21" of the petition of that date, verified by Marian C. Rizzi, as Secretary, instituting the Article 78 Proceeding above referred to.

(d) Such petition of October 2, 1965 (par. "10") alleges that on or about March 26, 1965, together with his resignation George Campbell, Jr. "—divested himself of his stockholdings". The present moving affidavit of George Morvan (par. "12") also recites that at the time of his resignation George Campbell, Jr. "—also disposed of his stock in plaintiff". The complaint herein (par. "9") is to the same effect. But the Minutes of the Special Meeting of April 9, 1965 state that it was at that time and place that George Campbell, Jr. "—surrendered Stock Certificate No. 6 in the amount of 10 shares transferred to George Campbell Painting Corp. to the Directors of George Campbell Painting Corp. at the meeting".

(e) This stock was undoubtedly of great value if the allegations of the vast nature and volume of plaintiff's business are to be credited. It will be noted that its Notice of Claim herein (Exhibit A annexed to the complaint) asserts one million dollars as damages against the Authority alone. Yet there is not a word in these Minutes as to the consideration or arrangements for the payment for such stock. Section 513 of the Business Corporation Law pro-

hibits a corporation from purchasing its own shares, except out of surplus. Yet there is no statement in these Minutes of the existence of such a surplus, or any reference thereto, or of any financial statement before the Meeting showing whether or not such a surplus existed.

26. After receiving the Notice of Claim of July 2, 1965 (Exhibit A annexed to the complaint, par. "20"), the Authority served upon plaintiff and its attorneys a Notice requiring it to submit to examination thereon pursuant to Section 157, subdivision 3 of the Public Housing Law. A copy thereof is hereto annexed as Exhibit B-1. It will be noted that it requires the submission to such examination of any officer, director *or employee* having knowledge of or being acquainted with each item of the claim, including, specifically, George Campbell, Jr. The complaint herein expressly alleges (par. "10") that since his purported resignation as officer and director on March 26, 1965 George Campbell, Jr. "—has been employed as an estimator by plaintiff—". Certainly he was the one best in a position to testify as to the circumstances, good faith, validity and effectiveness of his purported resignation and divestiture of his stock, which constituted the very foundation of the claim. Yet not only did George Campbell, Jr. not appear for such examination but neither did any officer of the corporation active in its affairs and having full knowledge thereof—not even Marian Rizzi, its secretary, and who verified the Notice of Claim. The only person who did appear was Theodore M. Ruzow, who, it will be noted, is one of the attorneys of record for the plaintiff herein, and who submitted to examination as a director of the corporation. At the examination there also appeared Harry Lipner, Esq., his law partner as attorney for the plaintiff, and Albert A.

Blinder, Esq., who stated that he was representing the absent George Campbell, Jr. as an individual.

27. The record of this examination, held at the Authority's offices on August 5, 1965, is quite revealing with respect to the matters hereinabove discussed. It will be furnished to the Court on the argument of these motions, and is hereby referred to as part of the documentary evidence upon which the cross-motion is based. Apart from the evasions, bickering with Authority counsel, refusals to answer, and denials of knowledge of material facts with which the examination is replete, some of the testimony which was given is herewith set forth, for the convenience of the Court, to demonstrate the inconsistencies and unbelievable assertions attending the purported resignation of and surrender of his stock to George Campbell, Jr. Page numbers below set forth are those of the stenographic record of the examination.

At pages 45 through 47 the following questions were put to and answered by Mr. Ruzow:

> Q. What consideration was paid George W. Campbell, Jr. on March 26, 1965, for the transfer of George Campbell Painting Corporation ten shares of stock? A. To my knowledge, no consideration was paid to him at that time.
>
> Q. As a director of the corporation, are you familiar with the nature of this transfer? A. Yes.
>
> Q. Will you state the circumstances under which he surrendered the ten shares of stock denominated as No. 6 in the stock certificate book? A. He decided to endorse the certificate to the corporation at the same time as he resigned as an officer and a director. These things were done.
>
> Q. Did you ask him why? A. I didn't specifically ask him why, no.

Q. Were you surprised? A. I don't want to characterize my emotions. I don't recall them.

Q. No, but, as a director of the corporation, when the President comes over to you and says "I resign as an officer; I resign as President; here are my ten shares of stock"; now, isn't it only normal to ask "What's the idea? What for? What's the reason"? A. I don't recall making such inquiry of him.

Q. Did you make any inquiry of him? A. I don't recall any specific conversation where we developed the reasons at that time for his conduct. I recall subsequent conversations where we discussed it at a greater length.

At pages 48 through 50 the following appears:

Q. As a director, you don't know that Mr. George W. Campbell, Jr. appeared with Mr. Lipner, your associate, at the office of District Attorney Phillips prior to March 26, 1965? A. In spite of the apparent facetiousness of your questions, I don't recall that I was informed, in my capacity as a director. Of course, I was made aware by my partner, Mr. Lipner, that he did visit the District Attorney's office with Mr. Campbell, yes.

Q. When March 26, 1965 came around and Mr. Campbell, Jr. handed in his resignation as an officer and director and he asked to sign the certificate of shares of stock, No. 6, for transfer, you then knew that he, before that, was at the District Attorney's office, is that correct? A. I would say generally that I did, yes. There is a striking similarity between your questions and the District Attorney's questions. I don't know now whether I am being questioned by the District Attorney's office

or the New York City Housing Authority, but I'm prepared to answer all valid questions, nevertheless.

Q. Is it a valid question to ask you to tell the circumstances under which George W. Campbell, Jr. resigned on March 26th and at the same time transferred his interest of ten shares of No. 6 certificate to the Campbell Painting Corporation? A. Yes, it is, and if you would ask me that question I would be happy to answer it.

Q. I am asking you that question. State all the facts and circumstances. A. The answer is that Mr. Campbell expressed his conclusion to me that he wanted to resign as an officer and director and surrender his stock and he prepared a resignation, it was given to me, the stock certificate was endorsed and that was also given to me, and it was properly recorded in the corporate books, and that's it.

Q. You said he prepared the resignation. He cannot type, can he? A. I think he can.

At pages 51 to 52:

Q. Can you tell me who drew the resignation? A. I cannot for sure.

Q. Is your name listed as a witness to that signature? A. My name and Mr. Lipner's appear as witnesses. I know that this was signed at my office, which was then 501 Fifth Avenue. I just can't tell you—I don't see the pertinency of it but you are a better judge of that, but I just don't know who actually prepared the document or typed it.

Q. When was that resignation put into the minute book, what date? A. Shortly thereafter. It was attached to the minutes of a special meeting

of the Board of Directors of the corporation, which took place on the 9th day of April at 10:30 A.M. at my office.

At page 55:

Q. When did George Campbell Painting Corporation stop paying George Campbell, Jr., for his services to the corporation, if they did stop? A. In what capacity, sir?

In any capacity? As president? A. As president, upon his resignation.

Q. And upon the transfer of the stock, was he paid in cash for the transfer of the stock? A. I have not testified that any payment has been made to him for the stock.

Q. Is there an agreement as to any payment to be made to him? A. Orally or written?

Q. Is there an agreement? A. To the present time, no formal agreement has been entered into.

Q. What informal agreement has been made and between whom has it been made and when? A. I have not said there was a formal agreement. I merely said there wasn't a formal agreement.

Q. All right. Was there an informal agreement? A. No informal agreement has been concluded.

Q. What was stated with reference to payment for the stock? A. The matter has just been generally discussed.

Q. Between whom? A. Among the directors.

Q. Name them, please. A. The directors of the corporation.

Q. And what was determined? A. No conclusion was reached.

Q. Was any price suggested by Mr. George W. Campbell, Jr.? A. No.

Q. Was any price offered by the directors? A. No.

Q. He was to receive no compensation for the stock? A. No definite conclusion was reached.

Q. Any particular reason why? A. I cannot express an opinion.

Q. As a director? A. I cannot express an opinion.

Q. As a director, you mean you cannot express an opinion? A. As a director, I cannot express an opinion.

Q. Who employed George W. Campbell, Jr., as an employee of George Campbell Painting Corporation? A. The officers of the corporation.

Q. Which officers employed him? A. I don't know the specific officer who employed him, but it would be one of the officers.

At page 60:

Q. Will you please state the circumstances under which George W. Campbell, Jr. was employed by George Campbell Painting Corporation, indicating the place, the time and the conversations or agreements? A. I have no direct knowledge and I expressed the opinion, inasmuch as you have asked me for an opinion, that no such formalities as you have indicated took place. This is still a fairly small business and not the New York City Housing Authority.

At page 61:

Q. Now, can you tell me the circumstances under which he was employed, when, how, who and the amount of compensation he is receiving for that employment? A. I cannot tell you more than this: That he was employed after his resignation as an officer and director. I don't know his exact salary. I be-

lieve it to be substantially less than the salary he earned as president of the corporation. I don't know if any specific interview took place for the purpose of hiring.

At page 62 through 64:

Q. Some officer employed him, and I think the officer who employed him knows more about him than you do; right? A. I have testified that he has been employed by an officer of the corporation, that he is employed, that he receives a salary. Now, what else do you want to ask me?

Q. I will ask you, will you produce the officer who employed him? A. I will not. You have asked for testimony. You have gotten the testimony you have asked for.

Q. I am not getting the testimony I asked for because I asked for officers and I did not get the answer as to who employed him. A. Mr. Stein—

Q. You are a director of the corporation? A. I am a director and, as director, I told you that he has been properly and politely employed.

Q. What do you base your conclusion upon? A. Conversations.

Q. With whom? A. With the officers of the corporation.

Q. Name them. A. We went through this about 25 minutes ago.

Q. You may not have spoken to all of them at the same time. A. I have not spoken to them at one time but we are satisfied to continue Mr. Campbell's employment.

Q. Will you state the time these conversations took place? A. No. I don't recall the specific time. We did not call a meeting to discuss it.

Q. When was the last time you spoke with George Campbell, Jr.? A. A week ago.

Q. Did you ask him anything about his employment? A. No. There was no need to.

At page 40, the Certificate of Stock for ten shares in plaintiff corporation allegedly "surrendered" or "disposed of" by George Campbell, Jr. was marked in evidence, and the following colloquy with respect thereto appears:

Q. I have before me a certificate of George Campbell Painting Corporation, No. 6, which has typed in above the face of the certificate the following: "The sale or other disposition of these shares are restricted pursuant to terms of a stockholders' agreement dated the ninth day of January 1964, a copy of which is on file with the office of the corporation."

I now ask you, was George W. Campbell, Jr., a party to this agreement? A. Yes.

Q. May I see that agreement, please? A. I refuse to show you the agreement.

29. A mere comparison of the foregoing testimony with the allegations in plaintiff's present moving affidavit and complaint will, it is respectfully submitted, show their glaring inconsistencies, and the lack of genuineness, good faith and even validity of the alleged resignation of and disposition or surrender of his stock by George Campbell, Jr. As to the latter, most striking is not only the lack of any provision to this date for payment for this very valuable stock, but the fact that its "sale or other disposition" was expressly prohibited by a stockholders' agreement referred to by endorsement on its face, and which plaintiff's attorney and director refused to produce. Further, while various of the inconsistencies, contradictions, evasions and incredible assertions pointed to above may individually seem small matters, taken as a whole and together they

should, it is respectfully submitted, persuade this Court that in seeking equitable relief in this matter of such major public importance, plaintiff does not come before it with candor, frankness and complete honesty—in a word, with "clean hands".

30. In addition to what has been stated above, there is a further substantially conclusive reason why plaintiff's motion must be denied and its complaint dismissed. Both George Campbell, Jr. and plaintiff itself have been indicted upon three counts of perjury in the first degree in that, in submitting the bids to the Authority for the very contracts here in issue, they falsely swore therein that such bids were genuine and not collusive or sham. A copy of such indictment is annexed hereto as Exhibit C. A motion to dismiss such indictment and for a bill of particulars thereof was denied by Hon. Justice Brust of this Court (N. Y. L. J., Oct. 6, 1965, Special and Trial Term, Part XXIX). The indictment is now pending. As will be amply demonstrated in the Memorandum of Law to be submitted herewith, it has been settled that under these circumstances this public agency would be fully justified in rejecting such a bidder as not qualified or responsible, and will not be enjoined from doing so.

31. Plaintiff's complaint states in conclusory terms that "—as a direct result of defendant's action—" it will lose countless opportunities to bid upon contracts with public agencies throughout the United States (Complaint, par. "24"). But the only specific fact it sets forth in this respect is a letter of rejection from the New Jersey State Highway Department, which states, as the reason therefore "—that your firm was banned by executive order of the Mayor of New York until April 27, 1970." (Complaint, par. "23"). A copy of such Executive Order is annexed

hereto as Exhibit D. Since the Authority is an independent autonomous public corporation, it is obvious that in any case, at least in this instance such rejection was not predicated upon any action taken by it, but by the City of New York; and that the complaint in this respect is without substance on its face.

32. There is one final obstacle to the relief demanded in plaintiff's motion and complaint in this action. It has been pointed out in par. "4" above that plaintiff instituted an Article 78 proceeding in this Court for the very relief now sought in this action, that it has served a Notice of Appeal from the judgment dismissing that action, and that that appeal is now pending undetermined. Accordingly, as provided by 3211 subdivision 4 CPLR, on this ground alone this action should be dismissed, unless the Court pursuant thereto makes such other order in the circumstances as justice may require.

33. In summary, deponent respectfully submits that it has been amply demonstrated by all of the foregoing that plaintiff's motion should be denied and defendant's cross motion to dismiss the complaint granted, for the following reasons:

(a) Under the express provisions of the contracts and Sections 2601 and 2602 of the Public Authorities Law plaintiff was properly disqualified whether or not George Campbell, Jr. resigned as president and director of plaintiff, and disposed of his stock therein, prior to his refusal to waive immunity. Plaintiff's interpretation of these provisions to the contrary is in error.

(b) Plaintiff has an adequate and exclusive remedy, for the relief sought in this action, in the proceeding provided for in Section 2603 of the Public

Authorities Law. It will be noted that that section provides for such a proceeding whether the disqualification is made under the mandatory provisions in these contracts required by Section 2601, or pursuant to the purely statutory provisions of Section 2602.

(d) Even if plaintiff's interpretation were correct, the documentary evidence shows on its face that such purported resignation and disposal of stock were not genuine, in good faith and valid, and that in making these assertions plaintiff does not come into this Court of Equity with "clean hands".

(e) Plaintiff and George Campbell, Jr. being presently under criminal indictment in connection with these very contracts, the Authority will be fully justified in continuing to refuse to accept further bids from them, and will not be compelled to do so by the relief sought in this action and motion.

WHEREFORE, deponent respectfully prays that plaintiff's motion herein be denied and its complaint dismissed, with costs.

PAUL W. HESSEL

(Sworn to January 31, 1966.)

Exhibit A Annexed to Hessel Affidavit

Letter

DISTRICT ATTORNEY
OF THE
COUNTY OF NEW YORK
155 Leonard Street
New York 13, N. Y.

April 16, 1965

Honorable William Reid
Chairman of the New York City
Housing Authority
250 Broadway
New York, New York

Re: *People* v. *John Doe et al.*

Dear Mr. Reid:

Following my letters of April 8th and April 14th, 1965, and in conformance with Section 103-b of the General Municipal Laws, this office advises you that Mr. George Campbell, Jr. of the George Campbell & Co. and George Campbell Corp., located at 40-11 49th Street, Flushing, New York, and Mr. Vincent B. Turecamo of the Ryan-Turecamo, Inc. of 275 Madison Avenue, New York City, refused to sign waivers of immunity before the New York County Grand Jury referred to in my letters of April 8th and 14th.

We would appreciate being advised as to what action your agency takes in this matter.

Sincerely,

Frank S. Hogan
District Attorney

MHM/cn

Exhibit B Annexed to Hessel Affidavit

Letter

[LETTERHEAD OF]
NEW YORK CITY HOUSING AUTHORITY
250 Broadway : New York, N. Y. 10007

April 21, 1965

George Campbell Painting Corp.
40-11 149th Street
Flushing 52, New York

Re: Contracts Nos.
PD 65-5A (McKinley, Morris & Morrisania)
PD 65-10C (First & Riis (F & C)
PD 65-14B (Lehman & Taft)

Gentlemen:

The Authority has been officially informed by the District Attorney of New York County that George Campbell, Jr., an officer of your company, has refused to waive immunity when subpoenaed to testify before the Grand Jury of that county in connection with a pending investigation to determine whether the crimes of bid rigging on public contracts, bribery of a public officer, bribery of a labor official, extortion, coercion, assault, and conspiracy to commit each of these crimes, has occurred in New York County.

Please take notice that by reason of the foregoing, and pursuant to the provisions of Section 38 of the General Conditions of the above contracts, the Authority has directed, and you are hereby advised, that such Contracts be and they hereby are cancelled and terminated, effective

immediately. You are directed to remove immediately from each of the projects covered by the above Contracts all your materials and equipment.

Please take further notice that in accordance with the further provisions of said Section 38 the Authority has directed, and you are hereby advised, that said George Campbell, Jr., and any firm, partnership or corporation of which he is a member, partner, director or officer, including your company, has been and will be disqualified from selling to or submitting bids to or receiving awards from or entering into any contracts with the Authority for goods, work or services, for a period of five (5) years after such refusal.

Yours very truly,

Gerald J. Carey
General Manager

CERTIFIED MAIL

RETURN RECEIPT REQUESTED

Exhibit B-1 Annexed to Hessel Affidavit

Notice of Examination

In the Matter of the Claim of George Campbell Painting Corp. dated July 2, 1965 relating to Contracts Nos. PD 65-5A (McKinley, Morrisania and Morris Houses), PD 65-10C (First and Riis Houses), and PD 65-14B (Lehman and Taft Houses),

against

New York City Housing Authority.

SIRS:

PLEASE TAKE NOTICE that the New York City Housing Authority, pursuant to the provisions of Section 157, subdivision 3, of the Public Housing Law, requires George Campbell Corp., the claimant named in the above entitled caption, by its president, and any officer, director, or employee having knowledge of or being acquainted with each item of said claim, including specifically, but not limited to, George Campbell, Jr., to appear at the principal office of the New York City Housing Authority, 250 Broadway, New York City, Room 624, on August 5, 1965, at 11:00 A.M. of that day, to testify under oath with respect to each and every item specified in its notice of claim dated July 2, 1965 and to answer orally as to any facts relative to the adjustment or disposition of such claim.

PLEASE TAKE FURTHER NOTICE that the New York City Housing Authority requires that George Campbell Painting Corp., at the time and place of said hearing, make

available to the Authority for its examination, on matters relating to each item of said claim the following:

1. Certificate of Incorporation, with amendments, if any, of George Campbell Painting Corp., the minute book, stock book, transfer book of George Campbell Painting Corp.

2. All documents, records and correspondence bearing upon and relating to the connection between Mr. George Campbell and George Campbell Painting Corp. in his capacity as President, officer, employee and stockholder.

3. Last Will and Testament of George Campbell, Sr. filed in Surrogate's Court, Queens County, and copies of all papers and proceedings connected thereto.

4. All records, documents, contracts, books and writings bearing upon and relating to the sum of $1,000,000 which sum is claimed as damages by George Campbell Painting Corp. in its notice of claim served upon the Authority.

Dated: New York, N. Y., July 20, 1965

Yours, etc.

HARRY LEVY, Counsel,
New York City Housing Authority,
250 Broadway
New York, N. Y. 10007
433-5175

To:

RUZOW & LIPNER, Esqs.
201 E. 42nd Street
New York City

Attorneys for Claimant

Exhibit C Annexed to Hessel Affidavit

Indictment

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK

against

GEORGE W. CAMPBELL, JR.

and

GEORGE CAMPBELL PAINTING CORP.,

Defendants.

The Grand Jury of the County of New York, by this indictment, accuse the above-named defendants of Perjury in the First Degree, committed as follows:

The defendants, in the County of New York on or about October 15, 1964, did commit perjury with respect to a material matter on an occasion in which an affirmation was required by law in that said defendants did unlawfully, knowingly, wilfully and falsely affirm as true the following non-collusive bidding statement:

> "That this bid is genuine and not collusive or sham. That said bidder has not colluded, conspired or connived * * * to fix the bid price * * *"

Exhibit C Annexed to Hessel Affidavit

Said false non-collusive bidding statement was submitted to the New York City Housing Authority in connection with an official bid tendered to said authority for the purpose of securing a contract to furnish the said authority with materials and services.

SECOND COUNT:

AND THE GRAND JURY AFORESAID, by this indictment, further accuse the defendants of the crime of Perjury in the First Degree, committed as follows:

The defendants, in the County of New York on or about October 20, 1964, did commit perjury with respect to a material matter on an occasion on which an affirmation was required by law in that said defendant did unlawfully, knowingly, wilfully and falsely affirm as true the following non-collusive bidding statement:

> "That this bid is genuine and not collusive or sham. That said bidder has not colluded, conspired or connived * * * to fix the bid price * * *"

Said false non-collusive bidding statement was submitted to the New York City Housing Authority in connection with an official bid tendered to said authority for the purpose of securing a contract to furnish the said authority with materials and services.

THIRD COUNT:

AND THE GRAND JURY AFORESAID, by this indictment, further accuse the defendants of the crime of Perjury in the First Degree, committed as follows:

The defendants, in the County of New York on or about November 30, 1964, did commit perjury with respect to a

material matter on an occasion on which an affirmation was required by law in that said defendants did unlawfully, knowingly, wilfully and falsely affirm as true the following non-collusive bidding statement:

> "That this bid is genuine and not collusive or sham. That said bidder has not colluded, conspired or connived * * * to fix the bid price * * *"

Said false non-collusive bidding statement was submitted to the New York City Housing Authority in connection with an official bid tendered to said authority for the purpose of securing a contract to furnish the said authority with materials and services.

Frank S. Hogan
District Attorney

Exhibit C Annexed to Hessel Affidavit

No. 1D

THE PEOPLE OF THE STATE OF NEW YORK

against

GEORGE W. CAMPBELL, JR.

and

GEORGE CAMPBELL PAINTING CORP., (NA)
Defendants.

INDICTMENT

PERJURY IN THE FIRST DEGREE

Penal Law Sect. 1620-a

FRANK S. HOGAN

District Attorney

A TRUE BILL

Foreman

Exhibit D Annexed to Hessel Affidavit

Executive Order

April 8, 1965

EXECUTIVE ORDER No. 138

TO: HEADS OF ALL DEPARTMENTS AND AGENCIES

FROM: ROBERT F. WAGNER, MAYOR

SUBJECT: DISQUALIFICATION OF CONTRACTING FIRMS

Section 103-b of the General Municipal Law provides that upon the refusal of any person, when called before a grand jury (a) to testify concerning any transaction or contract had with the State, City or any of their agencies, (b) to sign a waiver of immunity against subsequent criminal prosecution or (c) to answer any relevant question concerning such transaction or contract, such person, and any firm, partnership or corporation of which he is a member, partner, director or officer shall be disqualified from submitting bids or entering into any contracts with any municipal corporation for a period of five years after such refusal. The officer conducting the investigation before the grand jury is required to advise the various governmental agencies involved.

Whenever a City Department or City Agency has been officially informed by a District Attorney of the names of any firm, partnership or corporation, of which a member, partner, officer or director who has so refused, the Department or Agency shall take the following action:

1. Each contract with such firm, partnership or corporation shall be cancelled or terminated, subject only to payment of any monies owing for goods delivered or work done prior to such cancellation or termination.

Exhibit D Annexed to Hessel Affidavit

2. Such person, and any firm, partnership or corporation of which he is a member, partner, director or officer, shall be disqualified from thereafter selling to or submitting bids to or receiving awards from or entering into any contracts with the Department or Agency for goods, work or services for a period of five years after such refusal.

This order shall take effect immediately.

ROBERT F. WAGNER
Mayor

Exhibit D Annexed to Hessel Affidavit

[LETTERHEAD OF]

CITY OF NEW YORK
OFFICE OF THE MAYOR
New York 7, N. Y.

April 8, 1965

EXECUTIVE ORDER No. 138 ADDENDUM No. 1

TO: HEADS OF ALL DEPARTMENTS AND AGENCIES

FROM: ROBERT F. WAGNER, MAYOR

SUBJECT: DISQUALIFICATION OF CERTAIN CONTRACTING FIRMS

Official notification has been received from the District Attorney of New York County that the following persons have refused to sign waivers of immunity when subpoenaed to testify before the Grand Jury of New York County.

1. Max Gerben, of Gerben Contracting Corp., 2031 129th Street, College Point, New York.

2. Jerry Jerome, of Jered Contracting Corp., 1 East 42nd Street, New York 17, N. Y.

3. John Loconsolo, of Jack Loconsolo & Co., Inc., 2660 Coney Island Avenue, Brooklyn 23, N. Y.

4. Sam Spector, of Dunrite Painting & Decorating Co., 1475 Seabury Place, New York 60, N. Y.

5. Arnold Marcus of Marcus Decorating Co., 30 Church Street, New York 7, N. Y.

6. Melvin M. Bloom and Howard Bloom of Surf Painting Co., Inc., 3838 Flatlands Avenue, Brooklyn 34, N. Y.

Exhibit D Annexed to Hessel Affidavit

7. Samuel Garfinkel of Garfinkel Decorating Company, Inc., 90-50 Parsons Boulevard, Jamaica 32, N. Y.

8. Abraham Kaplan of Abraham Kaplan Co., Inc., 1847 Utica Avenue, Brooklyn, N. Y.

9. Benjamin Fishbein of Benay Painting Co., also known as the East River Painting Co., 157A Sherman Avenue, New York 34, N. Y.

In accordance with the policy set forth in Executive Order No. 138 all City Departments and Agencies are directed to take the necessary appropriate action immediately.

ROBERT F. WAGNER
Mayor

Exhibit D Annexed to Hessel Affidavit

[LETTERHEAD OF]

CITY OF NEW YORK
OFFICE OF THE MAYOR
New York 7, N. Y.

April 27, 1965

EXECUTIVE ORDER No. 138 ADDENDUM No. 2

TO: HEADS OF ALL DEPARTMENTS AND AGENCIES

FROM: ROBERT F. WAGNER, MAYOR

SUBJECT: DISQUALIFICATION OF CERTAIN CONTRACTING FIRMS

Official notification has been received from the District Attorney of New York County that the following persons have refused to sign waivers of immunity when subpoenaed to testify before the Grand Jury of New York County:

1. Vincent B. Turecamo, of Ryan and Turecamo, Inc., 275 Madison Avenue, New York, N. Y.
2. George Campbell, of George Campbell Painting Corp., 40-11 149th Street, Flushing, New York
3. Norman Straus, of Hubbard Painting Decorating, 172 Neptune Avenue, Brooklyn 35, New York
4. Meyer Peskim, of Pelham Painting Co., Inc., 524 Southern Boulevard, Bronx 55, New York

In accordance with the policy set forth in Executive Order No. 138 all City Departments and Agencies are directed to take the necessary appropriate action immediately.

ROBERT F. WAGNER
Mayor

Reply and Answering Affidavit of George Morvan in Support of Motion and in Opposition to Cross Motion

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

[SAME TITLE]

State of New York)
County of New York) ss.:

GEORGE MORVAN, being duly sworn, says:

1. I am the President of plaintiff and submit this affidavit to reply to certain statements contained in defendants' answering and cross-moving affidavit.

2. Defendants' cross-moving papers conceded that the relevant facts are not disputed and that the only relevant issue is one of interpreting the contracts between the parties. However, they move to dismiss on the ground of unclean hands, and purport to support this solely by speculation, innuendo and supposition concerning matters as to which defendants have actual knowledge contrary to their speculations.

3. If defendants were not aware of the true facts their position would not be as reprehensible and offensive.

4. Defendants know and have often done business with plaintiff. They know that young George Campbell, Jr. was only 23 years old in August, 1964 when his father, plaintiff's founder, died. They know that when he was appointed President, he had less than a year's experience in

the business and never actually assumed all of the duties and responsibilities of chief executive officer.

5. Defendants know that your deponent and a dozen or so other experienced executive employees, were all helping to train young Mr. Campbell, with a view toward his one day assuming full command.

6. Defendants know that hardly half a year had gone by when the youth had to resign and did resign under the circumstances set forth in the moving papers.

7. Defendants may not have known that your deponent was named President on December 1, 1965, but they certainly knew that your deponent was executive vice President.

8. Defendants know that the rest of the Campbell family have an independent and conflicting interest with young George, Jr., and that they owned more stock than he did.

9. I am not a "front" for George Campbell, Jr. (now 25 years old). Plaintiff is not a "front" for George Campbell, Jr. Obviously, the Campbell family regrets his inability to succeed his father, but his decision to refuse to sign a waiver of immunity left them no alternative—he had to step down and out.

10. Defendants imply a sinister motive to the fact that no agreement has been reached as to the amount of consideration to be paid for the ten percent stock interest surrendered by George Campbell, Jr. In the first place, non-controlling stock ownership by a disqualified person is not one of the criteria in the statute that defendants

could have used to disqualify plaintiff. In the second place, this obvious reason for not fixing the fair value of the stock is the inability of anyone to determine its fair value until the conclusion of all the investigations.

11. If there is bad faith involved in this case, it is the submission by defendants of an affidavit that deliberately ignores the true facts in order to suggest as fact what is known to be specious.

George Morvan

(Sworn to February 14, 1966.)

Order Staying the Action

At a Special Term, Part I of the Supreme Court of the State of New York, held in and for the County of New York, at the County Courthouse thereof, on the 18 day of March, 1966.

Present:

Hon. MITCHELL D. SCHWEITZER, Justice

GEORGE CAMPBELL PAINTING CORP.,

Plaintiff,

against

WILLIAM REID, FRANCIS V. MADIGAN, IRA S. ROBBINS, members of the New York City Housing Authority, and THE NEW YORK CITY HOUSING AUTHORITY,

Defendants.

Plaintiff, by its attorneys, Ruzow & Lipner, having moved by Order to Show Cause dated January 7, 1966 for an order enjoining *pendente lite* defendants from barring or disqualifying plaintiff from future bidding and directing the restoration of its name to the qualified bidder list, or, alternatively, directing that the issues raised herein be set down for an immediate trial, and the defendants having cross moved by Notice of Cross Motion dated January 31 1966, for an order dismissing the complaint, and the said motion and cross motion having regularly come on to be heard,

Now, on reading and filing the Order to Show Cause dated January 7, 1966, the affidavit of George Morvan, sworn to January 6, 1966, the summons and complaint veri-

fied by said George Morvan on January 6, 1966, with exhibits annexed thereto and the affidavit of George Morvan sworn to Feb. 14, 1966, in support of the motion and in opposition to the cross motion, and upon reading and filing the Notice of Cross Motion, dated January 31, 1966, the affidavit of Paul W. Hessel, sworn to the 31st day of January, 1966, with exhibits annexed, in opposition to the motion and in support of the cross motion, and after hearing Ruzow & Lipner, Esqs., Albert A. Blinder, of counsel, in support of the motion and in opposition to the cross motion, and Harry Levy, Esq., Paul W. Hessel and I. Stanley Stein, Esqs., of counsel, in opposition to the motion and in support of the cross motion, and after due deliberation having been had herein,

Now, upon motion of Ruzow & Lipner, attorneys for plaintiff, it is

ORDERED, that the cross motion is granted insofar as and only to the extent of staying the instant action pending final determination after appeal or termination in any fashion of plaintiff's appeal from the order of this court, per Hon. George Tilzer, dated December 14, 1965, and filed in the office of the Clerk of New York County on January 10, 1966; and it is further

ORDERED, that leave is hereby granted to plaintiff and defendants to renew at an appropriate time the instant motion and cross motion.

Enter,

/s/ MITCHELL D. SCHWEITZER
J. S. C.

Filed
Mar 21 1966
New York
County Clerk's Office

Opinion of Schweitzer, J.

(N.Y.L.J. March 8, 1966)

Plaintiff-painting contractor instituted this action for a permanent injunction of the enforcement by defendant the New York City Housing Authority of the disqualification and barring of plaintiff from bidding on public contracts with the aforesaid authority for a period of five years. At this initial stage of the lawsuit, plaintiff applies for a preliminary injunction which would, during the interim trial period, afford plaintiff the same relief as the ultimate remedy sought. Defendant has crossed-moved for an order dismissing the complaint upon, amongst other bases, the ground that another action is pending between the same parties for the same cause of action (CPLR 3211 [a] 4). An article 78 proceeding had been instituted by plaintiff in the instant action for an order annulling the subject determination by the New York City Housing Authority, and examination by both pleadings lends support to the contention by defendant. The application was denied and the petition dismissed without prejudice to a plenary suit as the court was convinced that an article 78 proceeding was not appropriate. At present, an appeal is pending from this judgment of dismissal. Logic and the rationale of fairness underlying CPLR 3211(a)4 require that, under the present circumstances, we adopt the view that "* * * an action in which a judgment has been rendered is deemed to continue to exist pending an appeal * * *" (Apelbaum v. Apelbaum, 16 Misc. 2d 636, 638; see 4 Weinstein-Korn-Miller, New York Civil Practice, pars. 3211.25-3211.21). Accordingly, defendant's cross-motion is granted in so far as it has been interposed pursuant to

CPLR 3211(a)4 and only to the extent of staying the instant action pending final determination after appeal or termination, in any fashion, of the aforesaid appeal or termination, in any fashion, of the aforesaid 78 proceeding. Within the context of the foregoing disposition, the application by plaintiff and the remainder of the relief requested in the cross-motion are, consonant with the foregoing, not considered, and leave is granted to renew at any appropriate time. Settle order.

Notice of Cross-Appeal

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

Index No. 247/1966

GEORGE CAMPBELL PAINTING CORP.,

Plaintiff,

against

WILLIAM REID, FRANCIS V. MADIGAN, IRA S. ROBBINS, members of the New York City Housing Authority, and THE NEW YORK CITY HOUSING AUTHORITY,

Defendants.

SIRS:

PLEASE TAKE NOTICE that the above-named defendants hereby cross-appeal to the Appellate Division of the Supreme Court, First Judicial Department, from the order made in this action dated March 18, 1966, and entered in the office of the Clerk of the County of New York on the 21st day of March, 1966, and from each and every part of said

order insofar as it relates to and affects defendants' cross-motion dated January 31, 1966.

Dated: April 7, 1966

Yours, etc.

HARRY LEVY
Attorney for Defendants
250 Broadway
New York, New York 10007
433-5010

To:

CLERK OF THE COUNTY OF NEW YORK

RUZOW & LIPNER, Esqs.
Attorneys for Plaintiff
201 E. 42nd Street
New York, New York 10017
697-7780

Order of Modification of the Appellate Division

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on the 3rd day of November, 1966.

Present—

Hon. Charles D. Breitel, Justice Presiding
Hon. Benjamin J. Rabin,)
Hon. Harold A. Stevens,)
Hon. Louis J. Capozzoli,)
Hon. Earle C. Bastow,)
Justices

10764

GEORGE CAMPBELL PAINTING CORP.,
Plaintiff-Appellant-Respondent,

vs.

WILLIAM REID, FRANCIS V. MADIGAN, IRA S. ROBBINS, members of the New York City Housing Authority, THE NEW YORK CITY HOUSING AUTHORITY,
Defendants-Respondents-Appellants.

Cross-appeals having been taken to this Court by the plaintiff-appellant-respondent from so much of the order of the Supreme Court, New York County, entered on March 21, 1966, as grants defendants' cross-motion to the extent of staying the instant action pending final determination after appeal or termination in any fashion of plaintiff's

Order of Modification of the Appellate Division

appeal from the order and judgment (one paper) of the Supreme Court, New York County, entered on January 10, 1966, and by the defendants-respondents-appellants from so much of the aforesaid order as relates to and affects defendants' cross-motion dated January 31, 1966,

And said appeals having been argued by Mr. Albert A. Blinder of counsel for plaintiff-appellant-respondent, by Mr. Paul W. Hessel of counsel for defendants-respondents-appellants, by Mr. Robert E. Hugh of counsel for Hon. Louis J. Lefkowitz, Attorney General of the State of New York, appearing pursuant to Executive Law, §71, and a brief amicus curiae having been filed on behalf of the District Attorney, New York County; and due deliberation having been had thereon; and upon the memorandum decision of this Court filed herein,

It is unanimously ordered that the order so appealed from be and the same is hereby modified, on the law and on the facts, with $50 costs and disbursements to defendants-respondents-appellants, so as to grant defendants' cross-motion to dismiss the complaint, with $10 costs, and the Clerk is directed to enter judgment in favor of the defendants dismissing the complaint, with costs.

Enter:

Hyman W. Gamso
Clerk.

Opinion of the Appellate Division

26 A.D.2d 365, 275 N.Y.S. 2d 365

Order, entered on March 21, 1966, granting defendants' cross-motion to dismiss the complaint pursuant to CPLR 3211(a) to the extent only of staying the action for a permanent injunction, pending a final determination of the article 78 proceeding instituted by plaintiff in this action against defendants in this action, unanimously modified on the law and on the facts, with $50 costs and disbursements to defendants-respondents-appellants and complaint dismissed. The complaint is insufficient because plaintiff is subject to the contractual agreements it made and because on the present allegations plaintiff does not establish a case for equitable relief. Order filed.

Remittitur from Court of Appeals

COURT OF APPEALS

STATE OF NEW YORK, SS:

PLEAS in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 7th day of July in the year of our Lord one thousand nine hundred and sixty-seven, before the Judges of said Court.

Witness,

The Hon. STANLEY H. FULD, Chief Judge, *Presiding.*
RAYMOND J. CANNON, *Clerk.*

Remittitur July 7, 1967

1. No. 116 67

George Campbell Painting Corp.,
Appellant,

vs.

William Reid, & ors., &c., & ano.,
Respondents.

BE IT REMEMBERED, That on the 12th day of March in the year of our Lord one thousand nine hundred and sixty-seven, George Campbell Painting Corp., the appellant in this cause, came here unto the Court of Appeals, by Ruzow

& Lipner, its attorneys, and filed in the said Court a Notice of Appeal and return thereto from the order of the Appellate Division of the Supreme Court in and for the First Judicial Department. And William Reid, & ors., &c., & ano., the respondents in said cause, afterwards appeared in said Court of Appeals by Harry Levy, their attorney.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

WHEREUPON, The said Court of Appeals having heard this cause argued by Mr. Albert A Blinder, of counsel for the appellant, and by Mr. Paul W. Hessel, of counsel for the respondents, and by Mr. Samuel A. Hirshowitz, of counsel for the Attorney General, brief filed by amicus curiae, and after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed, with costs.

And it was also further ordered that the records aforesaid, and the proceedings in this Court, be remitted to the Supreme Court of the State of New York, there to be proceeded upon according to law.

THEREFORE, it is considered that the said order be affirmed, with costs, as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be

Remittitur from Court of Appeals

enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, &c.

RAYMOND J. CANNON
Clerk of the Court of Appeals
of the State of New York

Court of Appeals, Clerk's Office,
Albany, July 7, 1967.

[SEAL]

I HEREBY CERTIFY, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

RAYMOND J. CANNON

Clerk

Opinion of Court of Appeals, State of New York

20 N. Y. 2d 370

283 N.Y.S. 2d 31

229 N.E. 2d 602

STATE OF NEW YORK

COURT OF APPEALS

[SAME TITLE]

PER CURIAM:

This is an action to nullify a determination of the New York City Housing Authority disqualifying the appellant corporation from bidding on future contracts with the Authority. In addition the appellant seeks an injunction against the Authority's enforcement of its decision. The disqualification is mandated by the Public Authorities Law §2601 since the appellant's former president appeared before a grand jury investigation bid-rigging and refused to sign a waiver of immunity.

We hold that section 2601 of the Public Authorities Law is constitutional (*Matter of Gardner* v. *Broderick*, 20 N Y 2d 227, 282 N.Y.S. 2d 487, 229 N.E. 2d 184, decided herewith) and that the disqualification imposed on the appellant corporation is valid. The fact that the appellant's officer resigned his position and that the resignation was accepted prior to his appearance before the grand jury and his refusal to sign a waiver of immunity is not controlling. Where the termination of the relationship of the individual officer with the corporation occurs almost contemporaneously with his refusal to sign a waiver of immunity or where it is obvious that the resignation was tendered and accepted solely for the purpose

of avoiding the statutory disqualification, the person so resigning or otherwise departing shall be deemed to have acted in his capacity as a corporate officer when he refused to sign the waiver.

There may be times when the statute will operate to penalize a corporation which had severed its connection with the recalcitrant officer and which has otherwise been cooperative. The Legislature has, however, recognized this problem and has specified a procedure by which the disqualification can be removed under such circumstances. (Public Authorities Law §2603). The appellant's exclusive remedy is the procedure outlined in that statute.

The orders of the Appellate Division should be affirmed with costs.

FULD, C.J., and VAN VOORHIS, BURKE, SCILEPPI, BERGAN and KEATING, JJ., concur.

BREITEL, J., taking no part.

Orders affirmed.

Notice of Appeal to the Supreme Court of the United States

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

INDEX NO. 247/66

GEORGE CAMPBELL PAINTING CORP.,
Plaintiff-Appellant,

against

WILLIAM REID, FRANCIS V. MADIGAN, IRA S. ROBBINS, Members of the New York City Housing Authority, THE NEW YORK CITY HOUSING AUTHORITY,
Defendants-Appellees.

I. Notice is hereby given that GEORGE CAMPBELL PAINTING CORP., the Appellant above named, hereby appeals to the Supreme Court of the United States from the final judgment of the Court of Appeals dismissing its complaint entered in this action on July 7, 1967.

This appeal is taken pursuant to 28 U. S. C. §1257(2).

II. The clerk will please prepare a transcript of the entire record in this cause, for transmission to the Clerk

of the Supreme Court of the United States, and include in said transcript the following:

1. Remittitur of the Court of Appeals dated July 7, 1967.
2. Opinion of the Court of Appeals.
3. Notice of Appeal to the Court of Appeals.
4. Order of Modification of the Appellate Division.
5. Opinion of the Appellate Division.
6. Notice of Appeal to the Appellate Division.
7. Notice of Cross Appeal to the Appellate Division.
8. Order of Special Term.
9. Opinion of Schweitzer, J.
10. Order to Show Cause.
11. Affidavit of George Morvan with Exhibits "A"—"D" annexed thereto.
12. Summons.
13. Verified Complaint with Exhibit "A" annexed thereto.
14. Reply and Answering Affidavit of George Morvan.
15. Notice of Cross Motion.
16. Affidavit of Paul W. Hessel with Exhibits "A"—"D" annexed thereto.

III. The following Questions are presented by this appeal:

1. Is the 14th Amendment offended by New York State's Public Authorities Law, §2602, which disqualifies

a corporation from eligibility to bid on public contracts if one of its officers or directors asserts his privilege against self incrimination when called before a grand jury?

a) If not, does the fact that the recalcitrant witness resigned his office and surrendered his control of the company's affairs prior to being called as a witness make a difference?

2. Is New York State's statutory requirement, Public Authorities Law §2601, that all public contracts contain an agreement to waive the privilege against self incrimination an unconstitutional condition of doing business with the state and its agencies?

RUZOW & LIPNER
Attorneys for Petitioner
Appellant
Office & Post Office Address:
122 East 42nd Street
Borough of Manhattan
City of New York

To:

CLERK, Supreme Court of the State of New York
County of New York

HARRY LEVY
Attorney for Defendants-Appellees
250 Broadway
New York, New York

LOUIS J. LEFKOWITZ
Attorney General of the State of
New York appearing pursuant to
Executive Law #71
Albany, New York 11224

Order Noting Probable Jurisdiction

No. 673 ....., October Term, 1967

GEORGE CAMPBELL PAINTING CORP.,
Appellant,

v.

WILLIAM REID, et al.

APPEAL from the Court of Appeals of the State of New York.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted. The case is placed on the summary calendar and set for oral argument immediately following No. 635.

January 29, 1968

SUPREME COURT U. S.

OCT 2 1967

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1967

No. 673

GEORGE CAMPBELL PAINTING CORP.,

Appellant,

against

WILLIAM REID, FRANCIS V. MADIGAN, IRA S. ROBBINS, Members of the New York City Housing Authority, and THE NEW YORK CITY HOUSING AUTHORITY,

Appellees.

No. .....

In the Matter of

GEORGE CAMPBELL PAINTING CORP.,

Appellant,

against

WILLIAM REID, FRANCIS V. MADIGAN, IRA S. ROBBINS, Members of the New York City Housing Authority, and THE NEW YORK CITY HOUSING AUTHORITY,

Appellees.

JURISDICTIONAL STATEMENT

THEODORE M. RUZOW
201 East 42nd Street
New York, New York 10017
Attorney for Appellant

ALBERT A. BLINDER
HARRY LIPNER
STEPHEN HOCHHAUSER
Of Counsel

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IN THE

Supreme Court of the United States

October Term, 1967

No. .....

GEORGE CAMPBELL PAINTING CORP.,

Appellant,

against

WILLIAM REID, FRANCIS V. MADIGAN, IRA S. ROBBINS, Members of the New York City Housing Authority, and THE NEW YORK CITY HOUSING AUTHORITY,

Appellees.

No. .....

In the Matter of

GEORGE CAMPBELL PAINTING CORP.,

Appellant,

against

WILLIAM REID, FRANCIS V. MADIGAN, IRA S. ROBBINS, Members of the New York City Housing Authority, and THE NEW YORK CITY HOUSING AUTHORITY,

Appellees.

JURISDICTIONAL STATEMENT

This jurisdictional statement covers two appeals from the New York State Court of Appeals, both of which involve identical questions. Rule 15(3) Supreme Court Rules.

Opinions Below

In the Appendix are reprinted the opinions in the Special Proceeding commenced pursuant to CPLR, Article 78, in the Supreme Court, New York County: 48 Misc. 2d 544, 765 N.Y.S. 2d 304, the Appellate Division, First Department, 275 N.Y.S. 2d 363 (not officially reported), and the Court of Appeals, 20 N.Y. 2d ——.

Also reprinted are the opinions in the plenary action in the Supreme Court, New York County, unofficially reported in New York Law Journal, March 8, 1966, the Appellate Division, First Department, 26 A.D. 2d 912, 275 N.Y.S. 2d 365, and the Court of Appeals, 20 N.Y. 2d ——.

In addition, there is added hereto the Court of Appeals opinion in *Gardner* v. *Broderick*, 20 N. Y. 2d 227, decided together with these cases, and on which the Court of Appeals relied in its decision.

Jurisdiction

(i) In both cases the constitutionality of a state statute, Public Authorities Law §§2601-2 was challenged but upheld in the state courts. They provide for automatic disqualification from doing business with the state upon refusal to waive, in advance, the privilege against self-incrimination. One proceeding was brought pursuant to Article 78 of the New York State Civil Practice Law and Rules to review an official determination that resulted in a five year disqualification of appellant's eligibility to bid on public contracts as well as the cancellation of appellant's three out-

standing contracts. The official determination was that one of appellant's officers had violated the provisions of §2602 and had caused a breach of the contract provisions made mandatory by §2601. That proceeding was dismissed (48 Misc. 2d 544, 265 N.Y.S. 2d 304) with leave to prosecute a plenary action for breach of contract. The other case here is the plenary action.

(ii) The judgment sought to be reviewed was made and entered on July 7, 1967, by the New York State Court of Appeals. It held that the statute was constitutional. The notice of appeal was filed on September 18, 1967 in the Supreme Court of the State of New York, to which the record in this case had been remitted by the Court of Appeals on July 7, 1967.

(iii) The jurisdiction of this Court over this appeal is conferred by 28 U.S.C. §1257(2).

(iv) The cases believed to sustain this Court's jurisdiction are: *Slochower* v. *Board of Education of N. Y.*, 350 U. S. 551, 100 L. ed 692, 76 S. Ct. 637 (1956); *Schroeder* v. *New York*, 371 U. S. 208, 9 L. ed 2d 255, 83 S. Ct. 279 (1962); *Kedroff* v. *Saint Nicholas Cathedral*, 344 U. S. 94, 97 L. ed 120, 73 S. Ct. 143 (1952).

(v) The validity of the New York State Public Authorities Law §§2601-2 is involved. The complete text is set forth in the appendix. It is published in McKinney's Consolidated Laws of New York Annotated, Book 42, Part 2, pp. 415-17.

Questions Presented

1. Whether the 14th Amendment is offended by New York State's Public Authorities Law, §§2601-2, which require the disqualification of a corporation from eligibility to bid on public contracts when one of its officers or directors asserts his privilege against self-incrimination when called before a grand jury?

(a) If not, does the fact that the recalcitrant witness resigned his office and surrendered his control of the company's affairs prior to being called as a witness make the application of the statute repugnant to the 14th Amendment?

2. Whether New York State's statutory requirement, Public Authorities Law §2601, that all public contracts contain an agreement to waive the privilege against self-incrimination, is an unconstitutional condition of doing business with the state and its agencies?

Statement of the Case

The appellant is a corporation engaged in the painting contracting business. A substantial portion of its business consisted of work done for the State of New York, its agencies and public authorities. Since 1959, when §§2601-2 of the Public Authorities Law went into effect, all of the contracts with public authorities on which appellant was the successful bidder were required to provide that if a grand jury conducts an investigation into its affairs, all of its officers and directors must testify and waive their privilege against self-incrimination or the contracts will be cancelled,

and appellant's name will be placed on a blacklist and it will suffer a five-year disqualification of eligibility to bid on any public contracts.

In the spring of 1965, a grand jury was convened in New York County to investigate possible irregularities in bidding on public contracts. All of appellant's officers and directors agreed to testify and waive the privilege against self-incrimination. On April 13, 1965, one of appellant's former officers* refused to waive his privilege against self-incrimination.

He was not asked any questions and he did not refuse to answer any questions. Yet, because he wouldn't waive his privilege in advance, appellant was vicariously penalized.

Appellant challenged the blacklisting in the two proceedings on appeal here. In the Article 78 proceeding appellant sought a hearing to review the disqualification. Appellant argued that the blacklisting was improper because, strictly construed, the statute did not apply to the appellant because the recalcitrant witness was not an "officer or director" at the time he refused to waive his privilege. This was the first case that sought to construe the statute. If the statute was construed as inapplicable to appellant then none of the constitutional problems would have to have been reached. Appellees moved to dismiss the proceeding, and Mr. Justice Tilzer granted the motion,

* The officer in question had resigned and surrendered his 10% stock interest prior to being subpoenaed to testify. He did this because of the statute and in an attempt to avoid injury to the five other stockholders and four other officers, all but two of whom derived their livelihood from appellant.

holding that appellant had a more adequate remedy in a plenary action for breach of the cancelled contracts in which it could also have sought equitable relief (*infra*, p. 15). An appeal was taken and a plenary action was commenced for breach of contract.

In the plenary action appellant moved for a preliminary injunction. In urging the court to construe the statute strictly, appellant argued that such a construction was salutary because

> "Respondents' interpretation of the statute [that a former officer could, for selfish reasons, cause a corporation to be disqualified] would give to one person the right, arbitrarily, to forfeit another's property. This raises serious constitutional questions of due process. It is not likely that the New York State Legislature could have intended such an unfair result, especially one so fraught with constitutional problems." (Appellant's Brief to the Supreme Court, New York County, in the plenary action, p. 17.)

This was how the constitutional question was first raised.

The lower court refused to grant a preliminary injunction and also refused to dismiss the complaint. Mr. Justice Schweitzer simply stayed the action pending the outcome of the appeal from the dismissal from the Article 78 proceeding. Again the decision did not deal with the merits of appellant's contentions (*infra*, pp. 16-17).

Appeals from both lower court determinations were consolidated for argument before the Appellate Division of the Supreme Court. Appellees lodged a cross-appeal in the plenary action. Appellant again argued that the court

should adopt a strict construction of the statute to avoid the constitutional issue, but if the court construed the statute as applicable to appellant, then it should refuse to enforce it because it was repugnant to the 14th Amendment. Thus, appellant's briefs in both cases contained as its first argument:

> "POINT I(a) The disqualification of [appellant] is unauthorized by the Public Authorities Law; or (b) The statute is repugnant to the federal and New York State Constitutions".

The argument urged by appellant was:

> "No wrongdoing can be imputed to the assertion of constitutional rights. *Griffin* v. *California*, 38 U. S. 609, 14 L. ed 2d 106 (1965); *Steinberg* v. *United States*, *supra*. The operative wrong here can only be argued to be lack of candor. See separate opinion by Mr. Justice Frankfurter in the *Beilan*, *supra* and *Lerner*, *supra*, cases at 375 U. S. 410, 2 L. ed 2d 1433. In fact, the Court of Appeals has held that mere refusal to waive immunity cannot even be deemed a refusal to be candid. *In re Grae*, 282 N.Y. 428 (1940). In any event, petitioner has not been guilty of any lack of candor and should not be penalized". (Page 16 of Appellant's Brief to the Appellate Division in both cases.)

It is not clear whether the Appellate Division rejected this argument. It appears from its decisions (*infra*, p. 17) that it deemed the contracts, which contained the provision required by §2601, to have estopped appellant from complaining.

Further appeals, one by permission and one as of right, were taken to the Court of Appeals. In the interim, on January 16, 1967, this Court announced its decision in

Spevack v. *Klein,* 385 U. S. 511, 17 L. ed 2d 574, 87 S. Ct. 625. Consequently, the arguments presented by appellants to the Court of Appeals had an additional dimension based on the argument that the *Spevack* case was controlling.

On July 7, 1967, the Court of Appeals affirmed the dismissal of both proceedings, stating:

> "We hold that Section 2601 of the Public Authorities Law is constitutional (*Matter of Gardner* v. *Broderick,* 20 N.Y. 2d 227 [decided herewith])".*

The Substantial Federal Question

The federal question raised is whether the assertion of the constitutional privilege against self-incrimination before the grand jury may, without more, result in a penalty, automatic disqualification from bidding on public contracts.

The ruling by the New York Court of Appeals in this case departs from well imbedded precedents in this Court that the assertion of the privilege may not, by itself, result in a forfeiture or penalty.

In *Slochower* v. *Board of Education,* 350 U. S. 551, 100 L. ed 692, 76 S. Ct. 637 (1956) this Court held that the mere assertion of the privilege, without more, could not result in automatic dismissal of a public school teacher. In later decisions, *Beilan* v. *Board of Education,* 357 U. S. 399, 2 L. ed 2d 1414, 78 S. Ct. 1317 (1958) (public school teacher), *Lerner* v. *Casey,* 357 U. S. 468, 2 L. ed. 2d 1423, 78 S. Ct. 1311

* The opinion in *Gardner* v. *Broderick* is reprinted in the appendix, *infra,* pp. 20-23.

(1958) (subway conductor), *Nelson* v. *Los Angeles,* 362 U. S. 1, 4 L. ed 2d 494, 80 S. Ct. 527 (1960) (social workers), and *Kimm* v. *Rosenberg,* 363 U. S. 405, 4 L. ed. 2d 1299, 80 S. Ct. 527 (1960) (deported alien), this Court distinguished between dismissal based solely on asserting the privilege and dismissal where the questions which were not answered bore upon the person's qualifications. Thus, it was lack of candor that justified the dismissal, and, without more, the assertion of the privilege could not be equated to a lack of candor. Until now this had also been the view of the New York courts. *In re Grae,* 282 N. Y. 428 (1940).

Recently, this Court, far from departing from these principles, has cast doubt on even the limited rationale in *Beilan, Lerner, Nelson* and *Kimm.* Thus, in *Malloy* v. *Hogan,* 378 U. S. 1, 8, 12 L. ed 2d 653, 84 S. Ct. 1489 (1964), this Court stated that the privilege meant "the right to remain silent * * * and to suffer no penalty * * * for such silence".

In *Griffin* v. *California,* 380 U. S. 609, 14 L. ed 2d 106, 85 S. Ct. 1229 (1965), this Court stated that anything that makes the assertion of the privilege costly "cuts down on the privilege".

Malloy and *Griffin* were criminal cases, as was last term's decision in *Garrity* v. *New Jersey,* 385 U. S. 493, 17 L. ed 2d 562, 87 S. Ct. 616 (1967) in which the privilege against self-incrimination was held to be a right "of constitutional stature whose exercise a state may not condition by the exaction of a price".

But, last term this Court also declared the Feinberg Law unconstitutional in *Keyishian* v. *Board of Regents,* 385

U. S. 589, 17 L. ed 629, 87 S. Ct. 675 (1967), overruling *Adler* v. *Board of Education,* 342 U. S. 485, 96 L. ed 517, 72 S. Ct. 380 (1952), which not even *Slochower* had suggested. And, in *Spevack* v. *Klein,* 385 U. S. 511, 17 L. ed 2d 574, 87 S. Ct. 625 (1967), this Court overruled *Cohen* v. *Hurley,* 366 U. S. 117, 6 L. ed 2d 156, 81 S. Ct. 954 (1961) holding that even when questioned on matters relating to his qualifications, a lawyer's refusal to answer on the basis of his privilege against self-incrimination could not result in the revocation of his license to practice.

In spite of this trend, the New York Court of Appeals has in this case sanctioned the disqualification of a company where its former president was not even asked any questions. The disqualification was solely because he refused to waive his privilege in advance.

The statute that the Court of Appeals upheld was designed for no other purpose than to make assertion of the privilege costly. Disqualification is automatic only when the privilege is asserted or its waiver is refused. Indeed, upon indictment for bribery or other corrupt practices, there is only discretionary refusal to accept bids. *Matter of Zara Contracting Corp.,* 45 Misc. 2d 497, 257 N.Y.S. 2d 479 (Sup. Ct. Alb. Co. 1964), aff'd 23 A.D. 2d 718, 257 N.Y.S. 2d 118 (3d Dept. 1965); *Caristo Const. Corp. v. Rubin,* 10 N. Y. 2d 538, 225 N.Y.S. 2d 502 (1962). There is not even a statute making conviction of such a crime an automatic disqualification. Automatic disqualification results only from asserting the privilege.

Moreover, since the statute deals solely with testimony before the grand jury, it has none of the positive features

discussed in *Beilan, Lerner, Nelson* and *Kimm* and by the dissenters in *Spevack*. Grand Jury testimony is secret under New York's Code of Criminal Procedure, §258. The District Attorney may not disclose a witness' testimony to the interested government agency regardless of how it bears on the witness's qualifications.

Not even the dissenting opinions in *Spevack, Garrity, Keyishian, Malloy* and *Griffin* suggest doing away with the *Slochower* doctrine. Yet the Court of Appeals has done just that. It states in *Gardner* v. *Broderick*, 20 N. Y. 2d 227, decided together with the instant case, that witnesses have "no constitutional right to remain in office when they refuse to discuss with frankness and candor whether they have faithfully performed their duties". By citing *Gardner* as the basis of its holding in these cases, the court has equated a refusal to sign a waiver of the privilege in advance with a refusal to be frank and candid, even though no question was asked and no answer refused.

The foregoing are substantial federal constitutional issues inevitably posed by this appeal. In addition, two subsidiary questions also pose substantial federal questions.

First, if the statute is unconstitutional, can contracts containing its mandatory language nonetheless be enforced? Since the Court of Appeals held the statute constitutional, it did not reach this issue. The Appellate Division did not seem to think it had to even reach the constitutionality of the statute because of the existence of the contracts.

Second, even if the statute is not invalid for the reasons expressed above, is it repugnant to the due process clause insofar as it has been applied to a corporation because of the acts of a former non-controlling officer? The Court of Appeals held that due process was satisfied by the procedure in §2603 for discretionary reinstatement. It rejected appellant's contention that discretionary reinstatement is no remedy for erroneous disqualification and is offensive to accepted notions of due process.

Conclusion

For the reasons stated above, it is prayed that this Court determine that it has jurisdiction over this appeal.

Respectfully submitted,

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Opinion by Tilzer, J.

(48 Misc. 2d 544, 265 N.Y.S. 2d 304)

This is an article 78 proceeding instituted by petitioner for an order annulling the determination made by respondent New York City Housing Authority barring and otherwise disqualifying petitioner from future bidding on public contracts for a period of five years. Respondent cross-moves, prior to answer, to dismiss the petition on multiple grounds.

The proceeding stems from the refusal of an alleged former officer of petitioner, George Campbell, Jr., to sign a waiver of immunity when called before a grand jury of New York County, in its investigation to determine whether the crime of bid rigging on public contracts, among others, had occurred in New York County.

The petition alleges that George Campbell, Jr., resigned on March 26, 1965, as an officer or director of petitioner, and on or about that date divested himself of his stockholdings. That since that date, he had been employed as an estimator by petitioner, a position which does not entail any management functions. That thereafter, on April 13, 1965, he was served with a subpoena to appear before the grand jury on April 14, 1965; that he did appear on said date, but refused to sign a waiver of immunity and was not questioned by the grand jury.

Such alleged resignation and divestiture of his stock interest in the corporation by George Campbell, Jr., prior to his refusal to waive immunity, appears to be the basis for this proceeding.

The question for determination is whether the petitioner presents a proper case for an article 78 proceeding. Respondents contend that petitioner has an adequate remedy at law. They rely on Public Authorities Law, section 2601, requiring that a clause shall be inserted in all contracts with any public authority created by the state for work or services performed or to be performed or goods sold or to be sold, that upon the refusal of any person when called to testify before a grand jury concerning any transaction or contract had with the state, public authority, &c., to sign a waiver of immunity, such person, and any firm, partnership or corporation of which he is a member, partner, director or officer, shall be disqualified from thereafter selling to or submitting bids to or receiving awards from or entering into any contracts with any public authority for goods, work or services for a period of five years after such refusal. The provision, mandated by section 2601, is contained in each of respondent's contracts with petitioner, under section 38 of the amendments to the general conditions thereof.

Respondent received a letter from the District Attorney of New York County stating that said George Campbell, Jr., of the petitioner corporation had refused to sign a waiver of immunity before the grand jury. Upon receipt of the district attorney's letter, the authority canceled the painting contracts with petitioner, and disqualified petitioner, as well as said George Campbell, Jr., and any other firm, partnership or corporation of which he is a member, partner, director or officer, from entering into contracts with the authority for a period of five years. Petitioner was so informed by letter of the Authority. This letter states that such action was taken pursuant to section 38

of the General Conditions of the contracts. Thus respondent argues that the disqualification is pursuant to contract with petitioner and if it was erroneous, petitioner's remedy is by way of plenary suit based on the contract.

The fact that section 38 of the General Conditions of the contracts was incorporated therein by reason of the mandate of section 2601 of the Public Authorities Law does not make its provisions any the less a purely contractual matter between the Authority and the petitioner. Here it appears that petitioner has a remedy based upon contracts with respondent.

The scheme of the Public Authorities Law provides not one, but two means by which the penalty of disqualification may be invoked against a recalcitrant contractor refusing to cooperate in a grand jury investigation involving public contracts. Thus, section 2601 provides for the mandatory contract provision whereby both cancellation and disqualification may be applied as a matter of contractual agreement between a public authority and such contractor. Section 2602, on the other hand, provides a purely statutory basis solely for disqualification even if such contractual provision were non-existent.

The court is not persuaded that this is a proper case for a proceeding under article 78. It is available only in those situations where there are no other remedies and the conditions surrounding its use are not found in the ordinary plenary suit (Matter of Wilson v. Board of Education, &c., 276 App. Div. 482).

Accordingly, the application is denied and the cross-motion is granted dismissing the petition without prejudice to a plenary suit. Settle judgment.

Opinion of Schweitzer, J.

(N.Y.L.J. March 8, 1966)

Plaintiff-painting contractor instituted this action for a permanent injunction of the enforcement by defendant the New York City Housing Authority of the disqualification and barring of plaintiff from bidding on public contracts with the aforesaid authority for a period of five years. At this initial stage of the lawsuit, plaintiff applies for a preliminary injunction which would, during the interim trial period, afford plaintiff the same relief as the ultimate remedy sought. Defendant has cross-moved for an order dismissing the complaint upon, amongst other bases, the ground that another action is pending between the same parties for the same cause of action (CPLR 3211 [a] 4). An article 78 proceeding had been instituted by plaintiff in the instant action for an order annulling the subject determination by the New York City Housing Authority, and examination by both pleadings lends support to the contention by defendant. The application was denied and the petition dismissed without prejudice to a plenary suit as the court was convinced that an article 78 proceeding was not appropriate. At present, an appeal is pending from this judgment of dismissal. Logic and the rationale of fairness underlying CPLR 3211(a)4 require that, under the present circumstances, we adopt the view that "* * * an action in which a judgment has been rendered is deemed to continue to exist pending an appeal * * *" (Apelbaum v. Apelbaum, 16 Misc. 2d 636, 638; see 4 Weinstein-Korn-Miller, New York Civil Practice, pars. 3211.25-3211.21). Accordingly, defendant's cross-motion is granted in so far as it has been interposed pursuant to

CPLR 3211(a)4 and only to the extent of staying the instant action pending final determination after appeal or termination, in any fashion, of the aforesaid appeal or termination, in any fashion, of the aforesaid 78 proceeding. Within the context of the foregoing disposition, the application by plaintiff and the remainder of the relief requested in the cross-motion are, consonant with the foregoing, not considered, and leave is granted to renew at any appropriate time. Settle order.

Opinion of the Appellate Division

275 N.Y.S. 2d 363 (not officially reported)

Order and judgment (one paper) unanimously affirmed, with $50 costs and disbursements to the respondents. No opinion. Order filed.

Opinion of the Appellate Division

26 A.D.2d 365, 275 N.Y.S. 2d 365

Order, entered on March 21, 1966, granting defendants' cross-motion to dismiss the complaint pursuant to CPLR 3211(a) to the extent only of staying the action for a permanent injunction, pending a final determination of the article 78 proceeding instituted by plaintiff in this action against defendants in this action, unanimously modified on the law and on the facts, with $50 costs and disbursements to defendants-respondents-appellants and complaint dismissed. The complaint is insufficient because plaintiff is subject to the contractual agreements it made and because on the present allegations plaintiff does not establish a case for equitable relief. Order filed.

Opinion of Court of Appeals, State of New York

20 N. Y. 2d ——

STATE OF NEW YORK

COURT OF APPEALS

[SAME TITLE]

PER CURIAM:

This is an action to nullify a determination of the New York City Housing Authority disqualifying the appellant corporation from bidding on future contracts with the Authority. In addition the appellant seeks an injunction against the Authority's enforcement of its decision. The disqualification is mandated by the Public Authorities Law §2601 since the appellant's former president appeared before a grand jury investigation bid-rigging and refused to sign a waiver of immunity.

We hold that section 2601 of the Public Authorities Law is constitutional (*Matter of Gardner v. Broderick*, 20 N Y 2d 227, decided herewith) and that the disqualification imposed on the appellant corporation is valid. The fact that the appellant's officer resigned his position and that the resignation was accepted prior to his appearance before the grand jury and his refusal to sign a waiver of immunity is not controlling. Where the termination of the relationship of the individual officer with the corporation occurs almost contemporaneously with his refusal to sign a waiver of immunity or where it is obvious that the resignation was tendered and accepted solely for the purpose

of avoiding the statutory disqualification, the person so resigning or otherwise departing shall be deemed to have acted in his capacity as a corporate officer when he refused to sign the waiver.

There may be times when the statute will operate to penalize a corporation which had severed its connection with the recalcitrant officer and which has otherwise been cooperative. The Legislature has, however, recognized this problem and has specified a procedure by which the disqualification can be removed under such circumstances. (Public Authorities Law §2603) The appellant's exclusive remedy is the procedure outlined in that statute.

The orders of the Appellate Division should be affirmed with costs.

* * *

Order affirmed, with costs. Opinion Per Curiam. All concur except Breitel, J., taking no part.

STATE OF NEW YORK

COURT OF APPEALS

No. 181.

In the Matter of

the Application of Robert Vincent Gardner,

Appellant,

For an Order &c.

vs.

Vincent L. Broderick, as Police Commissioner of the City of New York, & ano.,

Respondents.

FULD, Ch. J.:

In this article 78 proceeding, the petitioner seeks reinstatement as a patrolman in the New York City Police Department, claiming that he was dismissed solely for refusing to waive his privilege against self-incrimination and that it was unconstitutional for the Police Commissioner to discharge him on that ground. In August of 1965, a New York County Grand Jury was investigating accusations of bribery and corruption of police officers in connection with illicit gambling operations. The petitioner, then under departmental charges, was subpoenaed to appear before the grand jury. After being advised of the investigation and that the grand jury desired to question him concerning the performance of his official duties, he was requested to

sign a limited waiver of immunity—"to waive immunity from prosecution" for any misconduct in office disclosed by his testimony—as provided in section 1123 of the New York City Charter. (See, also, N. Y. Const., art. I, §6.)[1] The petitioner was also informed that, under both the Charter and the Constitution, he was required to sign the waiver and that, if he refused to do so, he would be discharged from his position as a police officer. He refused to execute the waiver and, following an administrative hearing, was dismissed from the force.

It is clear, and was so understood by the petitioner, that section 1123 of the Charter required him, as a condition of his continued employment by the police department, to waive his constitutional privilege against self-incrimination and to answer questions regarding the conduct of his office and the performance of his official duties. Such provisions have been upheld in the past (see, e.g., *Nelson v. Los Angeles County*, 362 U. S. 1) and, although the Supreme Court has indicated that the question may still be an open one

1. Section 1123 of the City Charter provides, in part, that, if any employee of the City "shall * * * wilfully refuse or fail to appear before * * * any officer, board or body authorized to conduct any hearing or inquiry, or having appeared shall refuse to testify or to answer any question regarding * * * official conduct of any officer or employee of the city or of any * * * county, on the ground that his answer would tend to incriminate him, or shall refuse to waive immunity from prosecution on account of any such matter in relation to which he may be asked to testify upon any such hearing or inquiry, his term or tenure of office or employment shall terminate and such office or employment shall be vacant."

And section 6 of article I of the State Constitution declares, insofar as relevant, that "No person shall * * * be compelled in any criminal case to be a witness against himself, providing, that any public officer who, upon being called before a grand jury to testify concerning the conduct of his * * * office * * * or the performance of his official duties * * *, refuses to sign a waiver of immunity against subsequent criminal prosecution or to answer any relevant question concerning such matters before such grand jury, shall by virtue of such refusal, * * * be removed from his * * * office by the appropriate authority."

(see *Spevack* v. *Klein*, 385 U. S. 511, 516, n. 3; *Stevens* v. *Marks*, 383 U. S. 234, 243), we find no constitutional defect in the statute as it applies to this petitioner.

In *Garrity* v. *New Jersey* (385 U. S. 493), the Supreme Court, deciding that the government may not use "the threat of discharge to secure incriminating evidence" against a public employee, held that a police officer could not be compelled to waive his constitutional privilege against self-incrimination by threats that he would otherwise be removed from office. The testimony obtained under such circumstances was ruled to be inadmissible in subsequent criminal proceedings brought against him. This decision undoubtedly had the effect of partially invalidating section 1123 of the New York City Charter as well as section 6 of article I of the New York Constitution. But nothing decided in the *Garrity* case bears on the issue in the present case. If the petitioner before us had executed the waiver required by section 1123 and then testified about misconduct in office, his testimony, though inadmissible in a criminal prosecution, would, nevertheless, have furnished sufficient cause to justify his dismissal from the police force. (Cf. *Ullman* v. *United States*, 350 U. S. 422, 430-431.)

In point of fact, the petitioner did not execute the waiver and stood on his constitutional privilege against self-incrimination when notified that he was to be questioned about malfeasance as a police officer. Such information patently bore upon his fitness to remain in office, information which the public had a right to know and the petitioner was under a duty to reveal. His refusal to speak on the subject constituted "employee insubordination for failure to give information which * * * the State has a legitimate interest in securing" (*Nelson* v. *Los Angeles County*, 362

U. S. 1, 7, *supra;* see *Spevack* v. *Klein,* 385 U. S. 511, 519, *supra* [*per* Fortas, J., concurring]), and, consequently, he was properly dismissed from the police force. (See *Canteline* v. *McClellan,* 282 N. Y. 166; *Christal* v. *Police Com. of San Francisco,* 33 Cal. App. 2d 564; *Cunningham* v. *Civil Service Com'n,* 48 Hawaii 278; *Fallon* v. *New Orleans Police Department,* 238 La. 531; *Souder* v. *Philadelphia,* 305 Pa. 1). Although people in public office and on the public payroll may not be compelled to surrender their constitutional privilege against self-incrimination (see *Garrity* v. *New Jersey,* 385 U. S. 493, *supra*), they have no constitutional right to remain in office when they refuse to discuss with frankness and candor whether they have faithfully performed their duties.

In *Spevack* v. *Klein* (385 U. S. 511, *supra*), the Supreme Court held that an attorney could not be compelled, upon pain of disbarment, to waive his privilege against self-incrimination and testify about his professional conduct. (See, also, *Matter of Cohen,* 7 N Y 2d 488, 498 [dissenting opinion].) However, a lawyer, though licensed by the State—like a doctor, barber or chauffeur—is not, as Mr. Justice Fortas pointed out in his concurring opinion in the *Spevack* case (385 U. S., at p. 520), "an employee of the State. He does not have the responsibility of an employee to account to the State for his actions." The petitioner, however, did have such a responsibility and his refusal to carry out that responsibility rendered him subject to removal from his position of public trust and confidence.

The order appealed from should be affirmed, without costs.

Order affirmed, without costs. Opinion by Fuld, Ch. J. All concur.

New York State Public Authorities Law

"2601 *Ground for Cancellation of Contract by Public Authority*

A clause shall be inserted in all specifications or contracts hereafter made or awarded by any public authority or by any official of any public authority created by the state or any political subdivision, for work or services performed or goods sold or to be sold, to provide that upon the refusal by a person, when called before a grand jury to testify concerning any transaction or contract had with the state, any political subdivision thereof, a public authority or with any public department, agency or official of the state or of any political subdivision thereof or of a public authority, to sign a waiver of immunity against subsequent criminal prosecution or to answer any relevant question concerning such transaction or contract.

(a) Such person, and any firm, partnership or corporation of which he is a member, partner, director or officer shall be disqualified from thereafter selling to or submitting bids to or receiving awards from or entering into any contracts with any public authority or official thereof, for goods, work or services, for a period of five years after such refusal, and to provide also that

(b) any and all contracts made with any public authority or official thereof, since the effective date of this law, by such person and by any firm, partnership or corporation of which he is a member, partner, director or officer may be cancelled or terminated by the public authority without incurring any penalty or damages on account of such cancellation or termination, but any monies owing by

the public authority for goods delivered or work done prior to the cancellation or termination shall be paid.''

''2602 *Disqualification to Contract with Public Authority*

Any person who, when called before a grand jury to testify concerning any transaction or contract had with the state, any political subdivision thereof, a public authority or with a public department, agency or official of the state or of any political subdivision thereof or of a public authority, refuses to sign a waiver of immunity against subsequent criminal prosecution or to answer any relevant question concerning such transaction or contract, and any firm, partnership or corporation, of which he is a member, partner, director or officer shall be disqualified from thereafter selling to or submitting bids to or receiving awards from or entering into any contracts with any public authority or any official of any public authority created by the state or any political subdivision, for goods, work or services, for a period of five years after such refusal or until a disqualification shall be removed pursuant to the provisions of section twenty-six hundred three of this title.

It shall be the duty of the officer conducting the investigation before the grand jury before which the refusal occurs to send notice of such refusal, together with the names of any firm, partnership or corporation of which the person so refusing is known to be a member, partner, officer or director, to the superintendent of public works of the state of New York and the appropriate departments, agencies and officials of the state, political subdivisions thereof or public authorities with whom the persons so refusing and any firm, partnership or corporation of which he is a mem-

ber, partner, director or officer, is known to have a contract."

"2603 *Removal of Disqualification of Public Contractors by Petition*

1. Any firm, partnership or corporation which has become subject to the cancellation or termination of a contract or disqualification to contract on account of the refusal of a member, partner, director or officer thereof to waive immunity when called to testify, as provided in sections twenty-six hundred one and twenty-six hundred two of this title, may, upon ten days' notice to the attorney general and to the officer who conducted the investigation before the grand jury in which the refusal occurred, commence a special proceeding at a special term of the supreme court held within the judicial district in which the refusal occurred for a judgment discontinuing the disqualification. Such application shall be in the form of a petition setting forth grounds, including that the cooperation by petitioner with the grand jury at the time of the refusal was such, and the amount and degree of control and financial interest, if any, in the petitioning firm, partnership or corporation by the member, partner, officer or director who refused to waive immunity is such that it will not be in the public interest to cancel or terminate petitioner's contracts or to continue the disqualification, as provided in sections twenty-six hundred one and twenty-six hundred two of this title.

A copy of the petition and accompanying papers shall be served with the notices to be given pursuant to this subdivision.

2. Upon the filing of such petition the court may stay as to petitioner, pending a decision upon the petition, the cancellation or termination of any contracts resulting from such refusal upon such terms as to notice or otherwise as may be just.

3. At least two days prior to the return day, the officer who conducted the investigation before the grand jury and the attorney general may file answers to the petition or apply for judgment dismissing the petition as a matter of law. On or before the return day the petitioner may file a reply to the answer.

4. Upon the return day the court may, upon the petition and answer and other papers filed, forthwith render such judgment as the case requires, or if a triable issue of fact is duly raised, it shall forthwith be tried before a court sitting without a jury or before a referee. The provisions of statute or rule governing references in an action shall apply to a reference under this subdivision.

5. The court shall render judgment dismissing the petition on the merits or discontinuing the disqualification upon the ground that the public interest would be served by its discontinuance, and granting such other relief as to the cancellation or termination of contracts as may be appropriate, but without costs to petitioner."

SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
OCT 30 1967
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 673

GEORGE CAMPBELL PAINTING CORP.,

Appellant,

against

WILLIAM REID, FRANCIS V. MADIGAN, IRA S. ROBBINS, Members of the New York City Housing Authority, and THE NEW YORK CITY HOUSING AUTHORITY,

Appellees.

GEORGE CAMPBELL PAINTING CORP.,

Appellant,

against

WILLIAM REID, FRANCIS V. MADIGAN, IRA S. ROBBINS, Members of the New York City Housing Authority, and THE NEW YORK CITY HOUSING AUTHORITY,

Appellees.

MOTION TO DISMISS OR AFFIRM

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Appellees.

MOTION TO DISMISS OR AFFIRM

Motion and Grounds

Appellees (hereinafter sometimes referred to as the "Authority"), hereby respectfully move, pursuant to Rule 16 of the Rules of this Court, that this appeal be dismissed, or in the alternative, that the order of the Court of Appeals of New York appealed from be affirmed, on the following grounds:

1. That this appeal is not within the jurisdiction of this Court.

2. That as an appeal from a state court

(a) it does not present a substantial federal question.

(b) the federal question sought to be reviewed was not timely or properly raised, or expressly passed on.

(c) the judgment appealed from rests on an adequate non-federal basis.

3. That in any event the decision of the state court involved in this appeal is so manifestly correct that no further argument thereon is necessary.

The Facts

References to the Record in the plenary action will be made as follows: (R.); and to the separate Record in the Article 78 proceeding as follows: (Art. 78 R.). References to Appellant's Jurisdictional Statement will be made thus: (Jur. Stat., p.).

Appellees respectfully submit herewith, by reference to the Records, somewhat more of the history, background and highlights of these litigations than are set forth in Appellant's Jurisdictional Statement. Upon the basis thereof Appellees propose to demonstrate by its argument below that the foregoing grounds for dismissal of this appeal, or for affirmance, are amply sustained.

1. Each of the three contracts between Appellant corporation and Appellee Authority described in the Records, executed on behalf of Appellant by George Campbell, Jr. as its president (R. 35), contained the following provisions (R. 36):

"38. Cancellation and Disqualification for Failure to Waive Immunity.

Upon the refusal by a person, when called before a Grand Jury to testify concerning any transaction or

contract had with the State, any political subdivision thereof, a public authority or with any public department, agency or official of the State or of any political subdivision thereof or of a public authority, to sign a waiver of immunity against subsequent criminal prosecution or to answer any relevant question concerning such transaction or contract.

A. Such person and any firm, partnership, or corporation of which he is a member, partner, director or officer shall be disqualified from thereafter selling or submitting bids to or receiving awards from or entering into any contracts with the Authority for goods, work or services, for a period of five (5) years after such refusal, and

B. This Contract and any and all other contracts made with the Authority on or after July 1, 1959, by such person and by any firm, partnership or corporation of which he is a member, partner, director or officer may be cancelled or terminated by the Authority, without incurring any penalty or damages on account of such cancellation or termination, but monies owing by the Authority, for goods delivered or work done prior to the cancellation or termination shall be paid."

While such provisions were mandated in all contracts of public Authorities by Section 2601 of the New York Public Authorities Law (Jur. Stat., pp. 24-25), it is Appellee's position, as set forth in its argument below, that under the powers granted to it by the New York Public Housing Law it would have had the right to include these provisions in its contracts regardless of the existence of Section 2601.

2. Section 2602 of the Public Authorities Law (Jur. Stat., pp. 25-26) sets forth an alternative provision for automatic disqualification from bidding public contracts, regardless of any action by a particular public agency under contractual provisions, of any contractor whose officer has refused to waive immunity in a specified grand

jury investigation. Such disqualification shall be "... for a period of five years after such refusal or until a disqualification shall be removed pursuant to the provisions of section twenty-six hundred three of this title".

3. Section 2603 (Jur. Stat., pp. 26-27) provides for a special court proceeding whereby the disqualification, whether imposed by and with respect to a particular public agency under contractual provisions pursuant to Section 2601, or automatically with respect to all public agencies pursuant to the statutory requirements of Section 2602, may be removed with respect to a "... corporation which had severed its connection with the recalcitrant officer and which has otherwise been cooperative". (Opinion of New York Court of Appeals, 20 N. Y. 2d 370, 376; Jur. Stat., p. 19.) However, the sole responding parties to such 2603 proceeding are to be the Attorney General and "... the officer who conducted the investigation before the grand jury in which the refusal occurred ..." (Jur. Stat., p. 26), the latter, in this instance, being the District Attorney of New York County.

4. The disqualification of Appellant corporation in question herein was set forth in Appellee Authority's letter of April 21, 1965 (Exhibit B Annexed to Petition, Art. 78, R. 20-21), and, as will be noted therefrom, was imposed wholly "... in accordance with the further provisions of said Section 38 ..." (of the contracts), as were the cancellation of such contracts.

5. Both such cancellation and disqualification were vigorously objected to in a letter of Appellant's attorneys to Appellee Authority dated April 23, 1965 (Exhibit C-1 Annexed to Petition, Art. 78, R. 23-26), which adverted to a previous letter of April 9, 1965 (Exh. C Annexed to Petition, Art. 78, R. 22), informing Appellee of George Campbell, Jr.'s resignation as an officer and director prior to his appearance before the Grand Jury. This letter reads, in part, as follows:

> "I direct your attention to Section 38 of the Amendments to General Conditions entitled 'Cancellation and

Disqualification for Failure to Waive Immunity'. It is a fact that George William Campbell, Jr. refused to waive immunity at an appearance before a Grand Jury of New York County on April 14, 1965.

Your attention is directed to Subdivision (a) of Section 38, which clearly speaks in the present tense, when it refers to the disqualification of the person failing to waive immunity and in Subdivision (b), it speaks in the present tense, when it refers to the right of the Authority to cancel existing contracts as a result of the relationship between the person failing to waive immunity and the corporation under contract with the Authority.

It is respectfully submitted that if George William Campbell, Jr. resigned as an officer, director and stockholder prior to his being called upon to waive immunity and prior to his failure to waive immunity, that the provisions of Section 38 have no application and should not be applied or enforced by the Authority, with relation to any contracts existing between the Authority and George Campbell Painting Corp."

6. Upon the rejection of such letter and a following telegram (Exh. E Annexed to Petition, Art. 78, R. 27), Appellant commenced in the Supreme Court of New York its first litigation in this matter. This was entitled as follows (See Stipulation as to Prior Proceedings, Art. 78, R. 38-39):

"In the Matter of the Application

of

GEORGE CAMPBELL PAINTING CORP.,

Petitioner,

For a Review Pursuant to Article 78 of the Civil Practice Law and Rules and Section 103(c) of the General Municipal Law,

against

WILLAM REID, FRANCIS V. MADIGAN, IRA S. ROBBINS, members of THE NEW YORK CITY HOUSING AUTHOR-

ITY, THE NEW YORK CITY HOUSING AUTHORITY, LOUIS J. LEFKOWITZ, Attorney General of the State of New York and FRANK S. HOGAN, District Attorney of the County of New York,

Respondents."

This litigation is nowhere mentioned in the Jurisdictional Statement, although by the above Stipulation (Art. 78, R. 38-39) it is expressly made part of the Record herein. The Petition therein set forth two "proceedings" (R. 33-34, 44): first, an Article 78 proceeding against Appellee Authority, and, second, a separate proceeding against the Attorney General and the District Attorney "... pursuant to Section 103(c) of the General Municipal Law ..." (which is identical with and was intended to refer to Section 2603 of the Public Authorities Law).

The Article 78 proceeding attacked the cancellation of the contracts and Appellant's disqualifications on the same ground of misinterpretation of the contractual provisions as was set forth in the letter of Appellant's attorneys referred to in Paragraph "5" above (Exhibit C-1 Annexed to Petititon, Art. 78, R. 23-26), while the proceeding against the Attorney General and District Attorney basically set forth the requirements of Section 2603 of the Public Authorities Law.

On its own motion Appellant voluntarily discontinued the latter proceeding. The Article 78 proceeding as against Appellee Authority was thereafter dismissed by Justice Lyman of the New York Supreme Court for failure of Appellant to have filed, as a condition precedent thereto, a Notice of Claim pursuant to Section 157 of the New York Public Housing Law, but with leave to renew (R. 33-34, 44).

7. Thereafter Appellant filed with Appellee Authority such Notice of Claim, dated July 2, 1965 (Exh. A Annexed to Complaint, R. 27-30). It will be particularly noted that

this claim seeks One Million Dollars in damages, the right to have its contracts reinstated, and the disqualification vacated, expressly on the following grounds:

> ". . . because of the New York City Housing Authority's wrongful interpretations and application of the provisions of the contract entered into by and between George Campbell Painting Corp. and the New York City Housing Authority and the applicable statutes.
>
> "The damages, wrongful cancellation of the contracts and wrongful barring of the claimant from future bidding for a period of five (5) years were sustained as a result of the action by The New York City Housing Authority purportedly pursuant to provisions of the contract and applicable statutes claiming a violation thereof by a member, partner, director or officer of the claimant refusing to sign a waiver of immunity. The New York City Housing Authority in making the determination of cancelling the existing contracts and barring petitioner from future bidding for five (5) years for the alleged refusal of George Campbell, Jr. to waive immunity before the New York Grand Jury, was a breach of contract and violated the claimant's rights and was based upon the erroneous information and/or interpretation of the aforesaid contracts and statutes in that the aforesaid George Campbell, Jr. was no longer an officer, director or stockholder of the petitioner at the time he refused to waive immunity before the Grand Jury, and, moreover, was not an officer, director or stockholder at the time a subpoena was served upon him for his appearance as aforesaid. The decision by The New York City Housing Authority was arrived at despite the fact that they were informed by letter dated April 9, 1965 that George Campbell, Jr. was no longer an officer and director of the corporation.
>
> The Undersigned, George Campbell Painting Corp., claims damages in the sum of One Million

($1,000,000.00) Dollars for loss of profits on contracts they were prevented from obtaining because of said wrongful determination by The New York City Housing Authority."

8. After filing such Notice of Claim, and predicated thereon, Appellant brought on against Appellee a second Article 78 proceeding. That is the proceeding set forth in the Article 78 Record herein, dismissed by Justice Tilzer of the New York Supreme Court without prejudice to a plenary suit (48 Misc. 2d 544, 265 N.Y.S. 2d 304; Jur. Stat. 13-15). Once more, and this time in conformity with the Notice of Claim upon which it was founded, Appellant's Petition therein was based expressly upon a claim of misinterpretation of the contractual and statutory provisions in not recognizing the purported resignation of George Campbell, Jr., and nothing more. Says this Petition, in part (Art. 78, R. 14):

"26. The action by the respondents . . . purportedly was pursuant to Section 2602 of the Public Authorities Law in that the aforesaid respondents thought that the aforesaid section had been violated by a member, partner, director, or officer of the petitioner refusing to sign a waiver of immunity.

"27. . . . this action by respondents . . . was an abuse of their discretion and was decided arbitrarily and capriciously, based upon erroneous information and/or interpretation of the aforesaid section of the Public Authorities Law.

"28. Such acts by the respondents were arbitrary, capricious and an abuse of discretion in that the aforesaid George Campbell, Jr. was no longer an officer, director, or stockholder of the petitioner at the time he refused to waive immunity before the Grand Jury, and moreover, was not an officer, director, or stockholder at the time a subpoena was served upon him for his appearance as aforesaid."

9. After service of Notice of Appeal from Justice Tilzer's order Appellant then commenced the third litigation, this time the plenary action now a subject of this appeal. This action was predicated upon the same Notice of Claim alleged in the Article 78 proceeding, and it was referred to in the complaint (Complaint, Par. "20", R. 25) and annexed thereto as an Exhibit (Exh. A Annexed to the Complaint, R. 27).

10. Accompanying this Complaint were an Affidavit and Order to Show Cause for an injunction *pendente lite* (R. 5-10). Once more these were based solely and wholly on the assertion that Appellee Authority had wrongfully disqualified Appellant corporation by reason of a misinterpretation of the contractual and statutory provisions. Says this affidavit, in part (Affidavit of George Morvan, R. 9):

> "17. By letter, hand delivered, on April 23, 1965 (Exhibit 'D' annexed hereto), counsel for plaintiff attempted to disabuse defendants of the numerous factual errors contained in their notice of disqualification, the most significant of which was the fact that the said George Campbell, Jr. was not an officer or director of plaintiff as defendants' notice alleged.
>
> 18. I am informed by counsel that defendants have taken the position that under Section 38 of the General Conditions of the aforesaid contracts between plaintiff and defendants and under Section 2601 of the Public Authorities Law, so long as George Campbell, Jr. was an officer or director when the contract was made, his resignation prior to his refusal to waive immunity is meaningless.
>
> 19. I am informed by counsel that the interpretation placed on the contracts and statute by defendants is clearly erroneous as the annexed Memorandum of Law amply demonstrates."

11. From the foregoing it is entirely clear that nowhere in any of the actual records of these three (actually four, counting the discontinued proceeding against the Attorney General and District Attorney) litigations brought by Appellant for relief from its disqualification, was the remotest question raised, or presented to the courts below, as to the constitutionality of such disqualification, or of the contractual or statutory provisions under which it was effected. On the contrary, all that Appellant sought, and the sole issue it presented to such courts, was an interpretation of such provisions. And in the first Article 78 proceeding it brought before Justice Lyman, Appellant, though subsequently discontinuing it, initially recognized the necessity for and validity of a proceeding to obtain the desired relief under Section 2603 of the Public Authorities Law.

12. Not until the third litigation (the plenary action) was commenced was any mention whatever made by Appellant of "constitutional problems", and then solely by its attorneys' brief and not by anything in the record. And even this was so incidentally, generally and cursorily referred to as not to present any specific constitutional question, state or federal, for adjudication by the courts (Jur. Stat., p. 6).

13. Not even this much of a "constitutional problem" having been raised in the Article 78 proceeding before him, the opinion of Justice Tilzer therein (48 Misc. 2d 544, 265 N.Y.S. 2d 304; Jur. Stat., p. 13) characterized the entire basis thereof as follows:

> (p. 545)
>
> "Such alleged resignation and divestiture of his stock interest in the corporation by George Campbell, Jr. prior to his refusal to waive immunity, appears to be the basis for this proceeding."

14. In the plenary action the opinion of Justice Schweitzer of the New York Supreme Court (Jur. Stat., pp. 16-17)

made no reference to any "constitutional problem". And the opinion of the Appellate Division modifying this determination by dismissing the complaint (26 A. D. 2d 912, 275 N.Y.S. 2d 365; Jur. Stat., p. 17), is based wholly on the record, and again without reference to any "constitutional problem", as follows:

> "The complaint is insufficient because plaintiff is subject to the contractual agreements it made and because on the present allegations plaintiff does not establish a case for equitable relief."

15. Although the New York Court of Appeals, in affirming the orders of the Appellate Division, did hold Section 2601 of the Public Authorities Law constitutional, and the disqualification valid (20 N. Y. 2d 370, 376; Jur. Stat., p. 18), this in itself, as will be shown in the argument below, does not raise a substantial federal question, or otherwise avoid the grounds upon which this motion is based. Principally, it will be noted, the opinion was concerned with the issues and contentions of the parties tendered by the record, and sustained Appellees' position that (a) the purported resignation was ineffectual to prevent the corporation's disqualification and (b) that in any event the exclusive remedy to be pursued by Appellant was that provided by Section 2603 of the Public Authorities Law. (It may be noted, parenthetically, that under the provisions of that statute this procedure may even now be available to Appellant.)

16. Finally, the attention of the Court is respectfully invited to the "Substantial Federal Question" asserted by Appellant, as follows:

> "The federal question raised is whether the assertion of the constitutional privilege against self-incrimination before the grand jury may, without more, result in a penalty, automatic disqualification from bidding on public contracts." (Jur. Stat., p. 8).

In this connection, it is to be noted that the record shows that:

(a) The choice of waiving or not waiving immunity was that of George Campbell, Jr., an individual, and not of this Appellant corporation.

(b) At the time this individual was faced with such choice he had assertedly divested himself not only of his offices, but of every interest in the corporation.

(c) Accordingly, the assertion of such privilege by George Campbell, Jr., was neither "costly" to nor imposed any penalty upon him, directly or through any interest he had in the corporation.

(d) George Campbell, Jr. is and was not at any time a party to these litigations, for the very good reason that at the time of the disqualification he was, and is, by virtue of such asserted divestiture, legally a stranger thereto. These proceedings do not involve his disqualification.

(e) The disqualification of the corporation was imposed pursuant to contractual provisions to which it expressly agreed. That such provisions were required by law makes them nonetheless contractual (See Opinion of Tilzer, J., Jur. Stat., p. 15).

Argument

A Federal Constitutional Question Not Having Been Expressly Passed Upon by the State Court as the Sole Basis for Its Determination, or Shown by the Record to Have Been Timely and Properly Raised, This Court Will Not Assume Jurisdiction of This Appeal.

It appears conclusively from the facts set forth above that nowhere in the Records of the three successive litigations brought by Appellant, two of which are involved in

this appeal, was any constitutional question of any nature—federal or state—raised or presented for adjudication by such courts. From the initial letters of Appellant's attorneys objecting to the disqualification of Appellant by Appellee Authority, through its Notice of Claim, its Petitions, Complaint and affidavits, all made part of the Records herein, Appellant presented solely the question of interpretation of the contractual provisions and statutes in question, and no constitutional issue of any nature.

Appellant's Jurisdictional Statement (Jur. Stat., p. 6) in effect concedes that this to be the case, asserting that solely by means of its attorneys' brief in the third litigation (the plenary action) did it in any way set forth before the court of first instance any matter of a constitutional nature. And even this statement presented nothing in the way of a specific constitutional issue, either state or federal, which called upon the state courts to make such an express constitutional adjudication, particularly of a federal nature, as is required to support the jurisdiction of this Court over this appeal.

As further pointed out above, the lower New York Courts completely ignored and made no mention of any constitutional matter in their decisions. It is true that the New York Court of Appeals (20 N. Y. 2d 376; Jury Stat., p. 18) did so in one sentence, and further cited a simultaneous decision in another case which in turn cited decisions of this Court on constitutiional questions.

As to this it is respectfully submitted, first, that the actual gravamen of the Court of Appeals decision was directed to the only issues presented by the records before it, to wit, the interpretation, not the constitutionality, of the contractual and statutory provisions involved, and the question whether the proper procedure for the relief sought by Appellant was exclusively that provided by Section 2603 of the Public Authorities Law.

Second, the ruling on constitutionality of section 2601 of the Public Authorities Law, even though it cited a case,

decided simultaneously, which in turn cited constitutional cases decided by this Court, does not clearly or expressly predicate such ruling on the federal constitution, or any particular provision thereof. Moreover, in the very sentence containing this ruling there is this statement: ". . . that the disqualification imposed on the appellate corporation is valid". From this it could be concluded that the Court of Appeals predicated its decision, at least in part, on the validity of the disqualification not under the statute, whether or not such statute was constitutional, but as a matter of interpretation under the express provisions of Section 38 of the Contracts. In this connection, the record before that court shows that it was by virtue of such contractual, and not statutory provisions, that the disqualification was both imposed and attacked. And if such contractual provisions could validly have been entered into by the parties—as will hereafter be shown—even if no statute mandating it were in existence, then obviously the reference to constitutionality of the statute, apart from its lack of specificity as to its federal nature, would be unnecessary to the decision. At least, it would not be the sole basis therefor, and therefore would be insufficient to support jurisdiction of this appeal.

In sum, at the most it is only by surmise that there can be spelled out a determination by this state court based solely and necessarily on a question of a federal nature, constitutional or otherwise. Under the foregoing circumstances it has repeatedly been held by this Court that such an appeal is not within its jurisdiction because it does not present a substantial federal question, timely or properly raised, or expressly passed upon (Rule 16).

The case of *Lynch* v. *New York,* 293 U. S. 52, frequently cited by this Court in dismissing appeals on such grounds, *a fortiori* demonstrates this. Therein the record showed that express federal constitutional questions had, unlike the present case, been properly and timely raised. Otherwise, this decision is so apposite to the circumstances of

the present case that leave is respectfully prayed to quote at length from the opinion of this Court therein, rendered by Mr. Chief Justice Hughes, as follows:

> (At pp. 53-55): "The relator sought review by the Supreme Court of New York, invoking rights under the Constitution and laws of the State of New York and under the Fourteenth Amendment of the Constitution of the United States. The Appellate Division of the Supreme Court, Third Department, annulled the determination of the State Tax Commission. 237 App. Div. 763, 263 N.Y.S. 259. That Court, while citing decisions of this Court under the Fourteenth Amendment, did not state that its decision rested upon the application of the Constitution of the United States. The Court of Appeals of the State affirmed the order of the Appellate Division, but without opinion (263 N. Y. 533, 189 N. E. 684), and the grounds of its decision are left to conjecture. It may be surmised, from the quotations in its opinion, that the Appellate Division intended to rest its decision upon a determination of the application of the Fourteenth Amendment, and that the affirmance by the Court of Appeals went upon the same ground, and not upon the non-federal ground of the application of the Constitution and laws of the State. But jurisdiction cannot be founded upon surmise. Nor can claim of jurisdiction be sustained by reference to briefs and statements which are not part of the record.
>
> "It is essential to the jurisdiction of this Court in reviewing a decision of a court of a State that it must appear affirmatively from the record, not only that a federal question was presented for decision to the highest court of the State having jurisdiction but that its decision of the federal question was necessary to the determination of the cause, and that it was actually decided or that the judgment as rendered could not have been given without deciding it. De Saussure

v. Gaillard, 127 U. S. 216, 234, 32 L. ed. 125, 132, 8 S. Ct. 1053; Johnson v. Risk, 137 U. S. 300, 306, 307, 34 L. ed. 683, 686, 11 S. Ct. 111; Walter A. Wood Mowing & Reaping Mach. Co. v. Skinner, 139 U. S. 293, 295, 297, 35 L. ed. 193-197, 11 S. Ct. 528; Eustis v. Bolles, 150 U. S. 361, 366, 367, 37 L. ed. 1111, 1112, 14 S. Ct. 131; Whitney v. California, 274 U. S. 357, 360, 361, 71 L. ed. 1095, 1098, 1099, 47 S. Ct. 641; Mellon v. O'Neil, 275 U. S. 212, 214, 72 L. ed. 245, 246, 48 S. Ct. 62. Where the judgment of the state court rests on two grounds, one involving a federal question and the other not, or if it does not appear upon which of two grounds the judgment was based, and the ground independent of a federal question is sufficient in itself to sustain it, this Court will not take jurisdiction. Allen v. Arguimbau, 198 U. S. 149, 154, 155, 49 L. ed. 990, 993, 25 S. Ct. 622; Johnson v. Risk, 137 U. S. 300, 34 L. ed. 683, 11 S. Ct. 111, supra; Walter A. Wood Mowing & Reaping Mach. Co. v. Skinner, 139 U. S. 293, 35 L. ed. 193, 11 S. Ct. 528 supra; Consolidated Turnp. Co. v. Norfolk & O.V.R. Co., 228 U. S. 596, 599, 57 L. ed. 982, 983, 33 S. Ct. 605; Cuyahoga River Power Co. v. Northern Realty Co., 244 U. S. 300, 302, 304, 61 L. ed. 1153, 1157, 1158, 37 S. Ct. 643."

That it is essential to jurisdiction that the federal constitutional issue must be timely and properly raised, and expressly passed upon by the state courts, has also been repeatedly held by this Court. *Bailey* v. *Anderson,* 326 U. S. 203, 206; *Wilson* v. *Cook,* 327 U. S. 474; *Beck* v. *Washington,* 369 U. S. 541, 549-554; *Charleston Federal Savings & Loan Association* v. *Alderson,* 324 U. S. 182, 186 (see, especially, footnote at p. 186).

This Appeal Does Not Present a Substantial Federal Question

A. The determination of the New York courts was predicated basically upon other than constitutional grounds —state or federal.

As has been seen, the disqualification was wholly grounded on the contractual provisions (Par. "4", *supra,* Art. 78, R. 20-21), and the attack on that action was primarily predicated upon Appellant's claim of misinterpretation of such provision (Par. "5", *supra;* Exh. C-1 Annexed to Petition, Art. 78, R. 23-26). Appellee respectfully submits that whether it included the provisions of Section 38 in its contracts by reason of the mandate of Section 2601 of the Public Authorities Law, or had included them even in the absence of such statute, is of no moment. They were purely contractual in either case, and must be so construed. That Appellee Authority had the right to provide for such conditions with or without specific statutory mandate or authority is clear from Section 151 of the New York Public Housing Law, which provides, in part, that the contracts of a Housing Authority may be ". . . in such form and contain . . . such terms and provisions as may be deemed advisable by the Authority". And under the further provisions of such Section 151 "An Authority may make rules and regulations governing the qualification of bidders . . .".

Both Justice Tilzer in the New York Supreme Court (Jur. Stat., p. 15), and the Appellate Division (Jur. Stat., p. 17), clearly based their decisions on such contractual provisions and their interpretation. And primarily, it is submitted, so did the Court of Appeals in affirming these determinations, in holding that ". . . the disqualification imposed on the appellant corporation is valid"; especially in view of the state of the records before it, the opinion of the courts below, and the language of the balance of its opinion interpreting the effect of the purported resignation on these provisions.

B. The contractual provisions and their enforcement present no constitutional or federal question.

Mandatory provisions are required both by state and federal law in private as well as in public contracts—such as standard forms of insurance policies, prevailing rate provisions, and others. Had the contracts here in issue been entered into by Appellant with a private owner, surely it could not contend that the imposition and enforcement of their waiver of immunity provisions, voluntarily assumed and agreed to by Appellant, could raise any constitutional question. That they were entered into with Appellee, a public corporation, makes no difference in their interpretation, validity, effect or enforceability.

Thus, in *Hollerbach* v. *United States,* 233 U. S. 165, this Court said:

[p. 171]:

> "A government contract should be interpreted as are contracts between individuals, with a view to ascertaining the intention of the parties and to give it effect accordingly, if that can be done consistently with the terms of the instrument."

Like private contracts, either the contractor takes them upon the terms and conditions offered, or he leaves them altogether. The choice is his, and it is a completely voluntary one. He cannot take the benefit of those terms which are to his advantage and refuse to assume the onus of those which he deems objectionable. And, it is respectfully submitted, this ought to be especially so where he is required to bid a public contract upon equal terms with his competitors. *Atkins* v. *Kansas,* 191 U. S. 207, 222; *Campbell* v. *City of New York,* 244 N. Y. 317, 327; *People* v. *Crane,* 214 N. Y. 154, 179, aff'd 239 U. S. 195.

Moreover, even were the waiver of immunity required by these contracts that of Appellant corporation itself (if there may be such a thing with respect to a corporation)

rather than that of its individual officer, George Campbell, Jr. (who is not even a party to these litigations), such waiver affected nothing more than its property rights, if any. As clearly appears from the Records, it is such rights only which were the basis of Appellant's attack on the disqualification. There is nothing illegal or unconstitutional in a contract pursuant to which a party waives a constitutional or statutory right, benefit or immunity affecting property rights only—unless, of course, a particular enactment prohibits such waiver.

Cooley, in his *Treatise on Constitutional Limitations* (8th Ed.), Vol. 1, pp. 368-369, puts it this way:

> "Where a constitutional provision is designed for the protection solely of the property rights of the citizen, it is competent for him to waive the protection, and to consent to such action as would be invalid if taken against his will.", citing:
>
> *Shepard* v. *Barron,* 194 U. S. 553;
> *Humbird* v. *Avery,* 195 U. S. 480;
> *Mayor, etc. of New York* v. *Manhattan Ry. Co.,* 143 N. Y. 1;
> *Musco* v. *United Surety Co.,* 196 N. Y. 459;
> *Pierce* v. *Somerset Railway,* 171 U. S. 641.

Wigmore, in his *Treatise on Evidence* (McNaughton, Rev. ed. 1961), section 2275, v. 8, p. 453, discussing contracts independent of statutory mandate, makes this statement with respect to "Waiver by Contract":

> "It has never been doubted that the privilege against self-incrimination, like all privilege is waivable."

C. The alleged deprivation of constitutional rights was not that of this appellant, and it has no standing to assert them.

To begin with, the privilege against self-incrimination is a purely personal one, and can neither be asserted by the corporation on behalf of its erstwhile individual officer, or

by such individual on behalf of the corporation. *Hale* v. *Henkel*, 201 U. S. 43, 74, 75; *Wilson* v. *United States*, 221 221 U. S. 361, 383-385; *Essgee Co.* v. *United States*, 262 U. S. 151; *United States* v. *White*, 322 U. S. 694, 699; *Baltimore and Ohio R. Co.* v. *Interstate Com. Com.*, 221 U. S. 612, 622.

In the last mentioned case this Court said, for instance:

[p. 622]:

> "With respect to its officers, it would be sufficient to say that the privilege guaranteed to them by this amendment is a personal one which cannot be asserted on their behalf by the corporation . . ."

But more important, it is respectfully submitted that "The Substantial Federal Question" posed by Appellant (Jur. Stat., p. 8), as well as the argument made and cases cited in its support (Jur. Stat., pp. 8-10), in themselves reveal that this Appellant corporation has neither standing nor basis for invoking the constitutional issue sought to be presented in this appeal. That argument is summed up in this statement: ". . . the assertion of the privilege may not, by itself, result in a forfeiture or penalty." (Jur. Stat., p. 8).

Appellee has no quarrel with this general principle. It must be remembered, however, that it was the individual, George Campbell, Jr., who refused to waive immunity, not Appellant corporation. If anyone's constitutional rights were impaired, they were his. But even as to him, and even were he a party to this appeal, what rights of his were impaired?

As noted, the argument is made, and cases cited for the proposition, that the right to refuse such a waiver cannot be made "costly" or the subject of a penalty. But in all of such cases the cost or penalty was threatened against or imposed upon the very one who invoked the privilege. In this instance, on the other hand, it is firmly and ada-

mantly maintained throughout the Records that at the time he was called upon to waive immunity George Campbell, Jr. was legally and actually a total stranger to this Appellant corporation, having given up not only his offices of president and director, but also all of his stock and other financial interests therein. Accordingly, although his refusal to waive immunity resulted in the disqualification of Appellant corporation, it resulted in no penalty or cost to him, individually, of any nature, directly or indirectly. While such disqualification may, indeed, have been costly to and penalized Appellant corporation, that was a risk it assumed by its contracts voluntarily entered into, and not by its assertion of the constitutional privilege posed by this appeal—even assuming that as a corporation it could assert such a privilege.

The Determination Appealed From Not Being Final Within the Meaning of the Judicial Code, 28 U.S.C. Section 1257, This Court Has No Jurisdiction Over This Appeal.

In its opinion the New York Court of Appeals expressly said (20 N. Y. 2d 370; Jur. Stat., p. 19):

(pp. 376-377)

"There may be times when the statute will operate to penalize a corporation which had severed its connection with the recalcitrant officer and which has otherwise been cooperative. The Legislature has, however, recognized this problem and has specified a procedure by which the disqualification can be removed under such circumstances. (Public Authorities Law, section 2603.) The appellant's exclusive remedy is the procedure outlined in that statute."

That such construction of this state statute was solely the province of the state Court is well settled. *Hicklin* v. *Coney,* 290 U. S. 169, 172. Accordingly, under this decision there has not been laid at rest the continued disqualifica-

tion of Appellant which it seeks to remove by this appeal, since, as the Court of Appeals has stated, it ". . . can be removed . . ." by pursuing this available, though exclusive, procedure. The determination is therefore not "final" within the meaning of the Judicial Code. As stated in *Market Street Railway Co.* v. *Commission of California,* 324 U. S. 548, 551:

> "Final it must be in two senses: It must be subject to no further review or correction in any other state tribunal; it must also be final as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein. It must be the final word of a final court."

And in *Gospel Army* v. *Los Angeles,* 331 U. S. 543, 546, this Court said:

> "It is no longer the rule that the face of the judgment is determinative of whether it is final. Today 'the test is not whether under local rules of practice the judgment is denominated final . . . but rather whether the record shows that the order of the appellate court has in fact fully adjudicated rights and that that adjudication is not subject to further review by said court.' Department of Banking v. Pink, 317 U. S. at 268."

In Any Event, the Decision of the State Court Appealed From Is So Manifestly Correct That No Further Argument Thereon Is Necessary.

Appellant relies largely for its attack on the statutory and contractual provisions herein on the recent decisions of this Court in *Garrity* v. *New Jersey,* 385 U. S. 493 and *Spevack* v. *Klein,* 385 U. S. 511 (Jur. Stat., pp. 8-10).

Neither of these cases overruled the line of decisions of this Court holding that although people in public office and on the public payroll may not be compelled to surrender their constitutional privilege against self-incrimination,

they have no constitutional right to remain in office when they refuse to furnish information patently bearing upon their fitness to do so, and to discuss with frankness and candor whether they have faithfully performed their duties. *Nelson* v. *Los Angeles County*, 362 U. S. 1, 7; *Beilan* v. *Board of Education*, 357 U. S. 399; *Lerner* v. *Casey*, 357 U. S. 468.

While *Garrity* held that testimony obtained from a police officer under a waiver of immunity induced by a threat of discharge could not be used against him in a criminal prosecution, nothing in the decision indicates that he could not have been discharged from his public office for failure to furnish such information under a waiver. The *Spevack* case, decided at the same time as *Garrity*, held that a lawyer, though licensed by the state—like a doctor, barber or chauffeur—could not be compelled, upon pain of disbarment, to waive his privilege against self-incrimination and testify about his professional conduct. But, as clearly indicated in the concurring opinion of Mr. Justice Fortas, had the case involved an employee of the state, with ". . . the responsibility of an employee to account to the state for his actions . . .", the decision would have been otherwise, and in conformity with the principles of *Nelson, Beilan* and *Lerner, supra.*

It was on this basis that the New York Court of Appeals decided *Gardner* v. *Broderick*, 20 N. Y. 2d 227 (Jur. Stat., pp. 20-23), cited in its opinion in the instant case. Also on this basis was a very recent decision by the United States Court of Appeals, Second Circuit, in *Uniformed Sanitation Men Association* v. *Commissioner of Sanitation*, —— F. 2d —— (decided Sept. 20, 1967) (not yet officially reported), upholding the discharge of city sanitation employees for refusal to furnish information by pleading their privilege against incrimination, citing *Nelson* v. *County of Los Angeles, supra*, 362 U. S. 1, 7.

That a contractor who voluntarily undertakes by public contract to furnish similar information bearing upon his

conduct in performing other such public contracts, and his consequent qualifications or lack thereof for the award of further public contracts, should be held to equal standards, would seem to be self-evident. It was so held in *United States ex rel. Laino* v. *Warden,* 246 F. Supp. 72 (S.D.N.Y. 1965), aff'd 355 F. 2d 208 (2d Cir., 1965). In an exhaustive and persuasive opinion by the District Court it was said:

[p. 92]:

"We now proceed to the asserted unconstitutionality of Section 103-b of the General Municipal Law of New York.

The statute here under attack was added to the General Municipal Law in 1959. A similar statutory provision was added to the State Finance Law to cover persons doing business with the State (State Finance Law § 139-b, McKinney's Consol. Laws, c. 56) and to the Public Authorities Law to cover persons doing business with a public authority of the state or any political subdivision thereof. (Public Authorities Law § 2602, McKinney's Consol. Laws, c. 43-A.)

The need for this legislation was set forth in the Memorandum of the Attorney General, wherein he stated:

'The Extraordinary Grand Jury conducting an investigation in Ulster County, on January 28, 1959 handed up a presentment pointing out that its inquiry had been blocked by the refusal of persons who had been selling merchandise and equipment to the county to give testimony about their dealings with public officials. It recommended legislation to meet that problem. This bill is such legislation.' (Memorandum of the Attorney General, N. Y. State Legislative Annual 1959, at 148.)

[p. 94]:

"The requirement in Section 103-b, that public contractors waive immunity before investigative bodies on the sanction of possible disqualification, has the same valid basis as those involving public employees.

"Accordingly, it can be argued that the sanction of possible disqualification present in Section 103-b is predicated on the lack of candor and frankness which is expected of one doing business with the state, and that such lack of cooperation and failure to discharge one's responsibility is incompatible with the position held, rather than a disqualification, *eo instantio,* based solely on one's invocation of his Fifth Amendment right. This rationale is, of course, the saving grace whereby prior sanctions of this nature have withstood judicial scrutiny.

[p. 95]:

"Moreover, in one sense relator owed a higher duty to freely discuss and answer questions relating to the performance of his official acts than a Government employee. In the case of a public employee, the state has at least a choice of hiring or not hiring an individual, whereas in the case of a contractor the state's ability to choose is severely restricted.

[p. 96]:

"Similarly in the case at bar, relator possessed no inalienable right to contract with the state. His right in that regard could be tempered by reasonable conditions imposed upon him, one of them being the necessity of being candid with the authorities and giving full answers to questions propounded by investigative bodies, the answers to which would reflect on his qualifications and fitness to utilize the privilege of doing that business. Accordingly, it is not unreasonable for the state to expect that business done with

it was above-board and that persons doing that business would be frank and assist in the investigation of their qualifications. To impede that investigation by any device is to preclude the state from judging those qualifications and breach the trust imposed on a 'quasi' governmental official such as a public contractor.

[p. 98]:

"Accordingly, the constitutionality of Section 103-b will be upheld by this Court."

Said this Court in *Bank of Augusta* v. *Earle* (13 Pet. 443, 512), 10 L. ed. 274, 312, 38 U. S. 517, 596:

"It is but justice to all the parties concerned, to suppose that these contracts were made in good faith, and that no suspicion was entertained by either of them, that these engagements could not be enforced."

CONCLUSION

It is respectfully submitted that this motion to dismiss or affirm should be granted.

October 27, 1967.

Respectfully submitted,

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SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
NOV 10 1967
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 673

GEORGE CAMPBELL PAINTING CORP.,

Appellant,

against

WILLIAM REID, FRANCIS V. MADIGAN, IRA S. ROBBINS, Members of the New York City Housing Authority, and THE NEW YORK CITY HOUSING AUTHORITY,

Appellees.

GEORGE CAMPBELL PAINTING CORP.,

Appellant,

against

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Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

MOTION TO DISMISS BY THE ATTORNEY GENERAL OF THE STATE OF NEW YORK

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MOTION TO DISMISS BY THE ATTORNEY GENERAL OF THE STATE OF NEW YORK

Intervenor-appellee, Louis J. Lefkowitz, Attorney General of the State of New York, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, moves that this appeal from the judgment of the Court of Appeals of the State of New York be dismissed.

Opinion Below

The opinion of the New York State Court of Appeals is reported at 20 N. Y. 2d 370, 229 N. E. 2d 602, and is reproduced in the appendix of appellant's Jurisdictional Statement at p. 18.

Jurisdiction

Appellant invokes the jurisdiction of this Court under 28 U.S.C. § 1257(2).

Statutes Involved

New York State Public Authorities Law §§ 2601-3 (Jurisdictional Statement pp. 24-27).

Questions Presented

1. Does the instant case present a justiciable controversy within the jurisdiction of this Court?

2. Does the question of the constitutionality of Public Authorities Law § 2602 raise a substantial federal question requiring plenary review before this Court?

Statement

During 1964, the appellant, a closely held family corporation, entered into three painting contracts with the appellee New York City Housing Authority. Each contract contained a standard paragraph 38 in accordance with Public Authorities Law § 2601, providing that, where a person refuses to sign a waiver of immunity when requested to appear before a grand jury to testify concerning public contracts, such person and any firm, partnership

or corporation of which he is a member, partner, director or officer shall be disqualified for five years from bidding on public contracts and any existing contracts shall be terminated (Jurisd. Statement, p. 24). All three contracts were executed on behalf of the appellant by its president, George Campbell, Jr., who was also a director and stockholder of the corporation.

Early in 1965, appellant's officers, including its president, became aware that the District Attorney of New York County was conducting an investigation before a Grand Jury to determine whether the crime of bid rigging on public contracts, including those entered into by appellant, had occurred in New York County. On March 26, 1965, George Campbell, Jr. purported to resign as president and director of the appellant corporation and to turn over his shares of stock. On the same date he became employed as an "estimator" by the appellant corporation.

The resignation was specifically arranged by the corporation to circumvent the express provisions of the contract containing the statutory language. The complaint alleged that Campbell became aware of the Grand Jury investigation of appellant corporation on March 26, 1965, and was advised by counsel that he "could expect to be subpoenaed and requested to waive statutory immunity".

The officers of appellant corporation were advised by the corporation's counsel "of the penalty that would result if any of us refused to waive immunity". Strangely, of all the officers and directors, only Campbell, "then only tweny-four years of age, and having the fewest years of service with the company, deemed it advisable to refuse to waive immunity", and he was, therefore, requested to offer and did offer his resignation.

On Friday, April 9, 1965, after Mr. Campbell allegedly had already been employed by appellant in his new capacity, the Board of Directors of appellant allegedly met and

purported to accept his resignation. On April 13, Mr. Campbell was served in the office of the corporation's lawyer with the subpoena. On April 14, the Grand Jury met. In accordance with his corporate arrangement, he refused to sign the statutory waiver of immunity and, consequently, was not asked to testify.

By letter dated April 16, 1965, the New York County District Attorney informed the Housing Authority that Campbell had refused to sign such a waiver of immunity. On April 21, 1965, the Authority advised appellant that, pursuant to § 38 of the general conditions of the contracts, the contracts were cancelled and terminated effective immediately and that Mr. Campbell and the corporation were disqualified from doing business with the Authority for five years.

Appellant commenced an action by way of an order to show cause for an order *pendente lite* enjoining the Housing Authority from barring or disqualifying appellant from future bidding and directing restoration of its name to the qualified bidder list. Appellee Housing Authority cross-moved to dismiss and the motion was granted only to the extent of staying the action pending determination of appellant's appeal from an order of the Supreme Court, New York County granting appellees' motion to dismiss the petition in a proceeding pursuant to Article 78 of the N. Y. Civil Practice Law and Rules. The Article 78 proceeding was for an order annulling the Housing Authority's determination barring and disqualifying appellant from public contracts for five years. The motion was granted without prejudice to the commencement of a plenary action.

On appeal to the Appellate Division, First Department, the order in the Article 78 proceeding was affirmed without opinion (Jurisdictional Statement, p. 17). On the same

date, on cross appeals, the order in the plenary action was modified in an opinion which stated in pertinent part that:

> "The complaint is insufficient because plaintiff is subject to the contractual agreements it made and because on the present allegations plaintiff does not establish a case for equitable relief." (*Id.* p. 17)

On consolidated appeals, the New York Court of Appeals held that Public Authorities Law § 2601 is constitutional citing *Matter of Gardner* v. *Broderick*, 20 N. Y. 2d 227, 229 N. E. 2d 184, appeal pending No. 635, Oct. T. 1967, decided the same day. The Court held the disqualification to be valid. The Court further held that the fact that the appellant's officer resigned prior to his appearance before the Grand Jury was not controlling where the resignation was virtually contemporaneous with his refusal to sign the waiver of immunity and where it was obvious that the sole purpose of the resignation was to avoid the statutory disqualification. The Court held that while there might be times when the statute would penalize a corporation which "had severed its connection with the recalcitrant officer and which has otherwise been cooperative", the Legislature had provided a procedure for the removal of such disqualification (Public Authorities Law § 2603). The Court concluded that "the appellant's exclusive remedy is the procedure outlined in that statute" (Jurisdictional Statement, pp. 18-19).

REASONS FOR GRANTING THE MOTION TO DISMISS

I

The instant case does not present a justiciable controversy within the jurisdiction of this Court.

Appellants claim that the question in the instant case is whether the assertion of the privilege against self-incrimination may result in its disqualification from bidding on public contracts. Appellant is confusing any individual rights of Mr. Campbell with its own rights. Depending on the facts, two basic claims might be open to Mr. Campbell were he a party to this proceeding. He might allege that his privilege against self-incrimination entitles him not to have coerced testimony introduced against him in a criminal proceeding and he might allege that he has a right not to suffer any penalty merely for having invoked the privilege against self-incrimination. Since he did not testify, his first claim would not be available. Contrast *Garrity* v. *New Jersey,* 385 U. S. 493. The question with respect to Mr. Campbell would thus become whether or not his disqualification was the result of his claim of the privilege against self-incrimination or a lack of candor or some other reason.

The corporation, however, has no interest in and can claim no derivative benefit from Mr. Campbell's privilege against self-incrimination. *United States* v. *White,* 344 U. S. 694. It thus cannot claim that any alleged impairment of Mr. Campbell's right to exercise the privilege gives it a right to assert the protection of his privilege for its own benefit. Any such right of Mr. Campbell would result from a claim of an unfair imposition of a penalty on him. The corporation cannot substitute the imposition of any alleged penalty on itself to complete the relation-

ship required before Mr. Campbell could assert such claim of impairment. And, of course, the corporation has no privilege of its own to assert. *United States* v. *White, supra.*

Whatever right the corporation may claim as a result of its having been disqualified from doing business with the State and from cancellation of its contracts can still be made the subject of a proceeding in the State pursuant to Public Authorities Law § 2603. *South Carolina* v. *Katzenbach,* 383 U. S. 301, 333. This, indeed, was the holding of the New York Court of Appeals. See *supra,* p. 5. Since this remedy, the exclusive remedy, as that Court held, has not been pursued, the decision of the New York Court of Appeals is not final with respect to appellant corporation and no justiciable controversy has been presented for resolution by this Court.

In any event, appellant is bound by the contracts it signed. It was a condition of the contracts, a condition of which all of appellant's officers and directors obviously were well aware, that, upon the refusal of any one of them to testify before a Grand Jury concerning their contracts, disqualification and cancellation would result. Appellant had the option of entering into the contracts on those terms and it cannot now overcome the fact that the contracts were breached. *Fahey* v. *Malonee,* 332 U. S. 245; *Ashwander* v. *Tennessee Valley Auhority,* 297 U. S. 288, 348 (Concurring Opinion); *Booth Fisheries* v. *Industrial Comm.,* 271 U. S. 208; *Buck* v. *Kuykendall,* 267 U. S. 307; *Campbell* v. *City of New York,* 244 N. Y. 317, 155 N. E. 628.

II

The instant case does not present a substantial federal question for review by this Court.

Even if appellant could assert that its disqualification by virtue of Mr. Campbell's refusal to waive immunity vio-

lates some right of its own, its attack on the constitutionality of New York Authorities Law § 2601 is insubstantial. The jurisdictional statement implies that the provision was not inserted because of the necessity for demanding candor on the part of public employees and contractors. It thus apparently regards as inapposite the cases of *Nelson* v. *Los Angeles,* 362 U. S. 1; *Beilan* v. *Board of Education,* 357 U. S. 399; *Lerner* v. *Casey,* 357 U. S. 468 and *Slochower* v. *Board of Education,* 350 U. S. 551. Each of these cases clearly establishes that the State may, under circumstances substantially the same as those in the instant case, require testimony from its employees and contractors with respect to their duties and contracts.

The governmental interest leading to the enactment of the statute was very strong. The need for candor was obviously its motivation. In approving the legislation to deal with the problem of contractors who refused to testify about their dealings, Governor Rockefeller pointed out:

> "Unlike a private person who may contract with whom he wishes, a public agency usually lets contracts by public auction and is required to accept the lowest bid. For that reason, it would seem appropriate to disqualify the bids of persons who are unwilling to disclose to a grand jury facts relating to some prior contract with the public. Likewise, it would seem appropriate that public contracts should provide that the benefit accruing under them be available only so long as the beneficiary is willing, when required by a grand jury, to disclose any information he may have as to a public contract." Memorandum of the Governor, N. Y. State Legislative Annual (1959), p. 431.

The Legislature was concerned not only with obtaining low bidders, but also responsible bidders, and was determined that any contract awarded would best promote the public interest. The Legislature has affirmatively dictated

that it is of the highest importance that there be no collusive bidding or bid rigging for public contracts. This they have done by requiring that in every public contract proper assurances be incorporated by the private contracting party to that effect (See e.g. General Municipal Law, § 103-d). The New York statute is substantially identical with federal requirements. See 41 C.F.R. § 1-1, 317 (1965) (Federal Procurement Regulations).

In order to determine whether or not bidders are responsible, public agencies must be able to insure candor on the part of public contractors and to protect the public from persons or corporations which feel they cannot be candid in their public dealings. The provisions of the statute are in no respect arbitrary in insisting on such candor.

Appellant's claim that the automatic operation of the statute deprives it of due process once more ignores the existence of the hearing provided in the Public Authorities Law § 2603. The fact that that hearing may be obtained only after disqualification does not deprive appellant of due process of law. See *Lerner* v. *Casey, supra; South Carolina* v. *Katzenbach, supra; Bowles* v. *Willingham,* 321 U. S. 503, 520.

Neither *Garrity* v. *New Jersey,* 385 U. S. 493 nor *Spevack* v. *Klein,* 385 U. S. 411, gives substance to the issues sought to be presented. *Garrity* is inapposite because no testimony was used. The *Spevack* case does not purport to overrule the line of cases beginning with *Slochower, supra,* which holds that candor may be required of a public employee. It holds only that the privilege against self-incrimination could not be withheld from an attorney so that he would be denied the opportunity to challenge the relevance to the proceeding of the documents demanded of him. It did not even indicate that candor could not be required of attorneys within the scope of the information the State legitimately could require of them.

In any event, the public contractor, even more than the public employee, must be accountable for its dealings with respect to such public contracts, and the failure of candor required by the contract is intolerable. See *Spevack* v. *Klein, supra,* at 519-20 (concurring opinion). Any other result would render meaningless the whole system of public bidding written into law.

CONCLUSION

For the foregoing reasons the within motion to dismiss should be granted.

Dated: New York, New York, November 8, 1967.

Respectfully submitted,

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SUPREME COURT, U. S.

FILED

NOV 15 1967

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1967

No. 673

GEORGE CAMPBELL PAINTING CORP.,

Appellant,

against

WILLIAM REID, FRANCIS V. MADIGAN, IRA S. ROBBINS, Members of the New York City Housing Authority, and THE NEW YORK CITY HOUSING AUTHORITY,

Appellees.

In the Matter of

GEORGE CAMPBELL PAINTING CORP.,

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BRIEF IN OPPOSITION TO MOTIONS TO DISMISS OR AFFIRM

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Appellees.

BRIEF IN OPPOSITION TO MOTIONS TO DISMISS OR AFFIRM

The Motion

Appellees' motion to dismiss or affirm proceeds on four grounds. They claim that:

(a) The Appellant's challenge to the constitutional validity of New York State's Public Authorities Law

§2601 et seq. was not passed upon nor timely or properly raised in the state court.

(b) An adequate non-federal basis supports the judgment;

(c) The federal questions are not substantial or, in any event, were correctly decided; and

(d) The determinations are not final.

The Attorney General's motion adds the claim that Appellant has no standing to challenge the validity of the statute that authorized and compelled its disqualification.

ARGUMENT

I

The constitutional questions were raised, decided by the New York Court of Appeals and were the only grounds of its decision.

Insofar as Appellees' motion rests on a claim that the constitutional questions were neither passed upon nor timely or properly raised, and that a non-federal ground actually formed an independent basis for the state court's decision, it is thoroughly frivolous.

One glance at the Records on Appeal shows the formal appearance of the New York State Attorney General pursuant to Executive Law §71. That statute (McKinney's Consolidated Laws of New York, Book 18, p. 41) reads:

"§71. Attorney-general to appear in cases involving the constitutionality of an act of the legislature

"Whenever the constitutionality of a statute is brought into question upon the trial or hearing of any action or proceeding, civil or criminal, in any court of record of original or appellate jurisdiction, the court or justice before whom such action or proceeding is pending, may make an order, directing the party desiring to raise such question, to serve notice thereof on the attorney-general and that the attorney-general be permitted to appear at any such trial or hearing in support of the constitutionality of such statute. The court or justice before whom any such action or proceeding is pending may also make such order upon the application of any party thereto, and the court shall make such order in any such action or proceeding upon motion of the attorney-general. When such order has been made in any manner herein mentioned it shall be the duty of the attorney-general to appear in such action or proceeding in support of the constitutionality of such statute."

The Attorney General appeared in both the Appellate Division and the Court of Appeals solely in response to the attack by Appellant on the constitutional validity of the Public Authorities Law. Plainly, the constitutional questions were raised.

Moreover, it is well settled that

"Where it appears from the opinion of the state court of last resort that a state statute was drawn in question as repugnant to the constitution and that the decision of the court was in favor of its validity, we have jurisdiction on appeal. For we need not inquire how and when the question of validity of the statute was raised when such question appears to have been actually considered and decided by the court." *Charleston Fed. Sav. & L. Asso.* v. *Alderson,* 324 U.S. 182, 185-6, 89 L. ed. 857, 861, 65 S. Ct. 624 (1945).

Here, the court's opinion shows clearly that the constitutional validity of the statute was drawn in question and upheld (J.S. pp. 18-23).*

In *Herb* v. *Pitcairn,* 324 U.S. 117, 89 L. ed. 789, 65 S. Ct. 459 (1945), jurisdiction was sustained where the state court's decision was only relevant upon the assumption that the federal question was considered.

In *New York ex rel. Bryant* v. *Zimmerman,* 278 U.S. 63, 73 L. ed. 184, 49 S. Ct. 61 (1928), jurisdiction was upheld where, from the state court's opinion and its citations, it was obvious that a federal constitutional question was involved even though the opinion did not specifically allude to any portion of the federal constitution.

Appellees claim, that the Court of Appeals ruled specifically on contractual and non-constitutional grounds, is refuted by the Court's own opinion (J.S. pp. 18-23). But, the claim is especially surprising in view of the fact that Appellees and the Attorney General both abandoned this so-called contract theory during oral argument to the Court of Appeals.

There appears in the Appendix to this brief a certified transcript of the oral arguments presented to the Court of Appeals by Appellees and the Attorney General.

Paul W. Hessel, Esq., "of counsel" to the attorney for Appellees, had the following colloquy with the Court:

> "Van Voorhis, J.: The argument that they signed the contract and agreed to this voluntarily is, I suppose, subject to whether the clause is illegal or not.

* Reference to the Appellant's Jurisdictional Statement will be J.S. p.

"Mr. Hessel: I agree with that, your Honor—I'll agree to that. In fact, I may say that my opponent—

"Van Voorhis, J.: By legal I mean constitutional." (App. p. 8a)*

• • •

"Van Voorhis, J.: Suppose this statute is contrary to the constitution, then you say it becomes valid because the contract was voluntarily signed and it didn't have to be—

"Mr. Hessel: No, I'm not saying that, your Honor,

"Van Voorhis, J.: Doesn't it add up to that?

"Mr. Hessel: What I'm saying is that this statute, like the statutes which provide for discharge of public employees in the event of their failure to testify as to the narrow questions relating to their employment, is just as valid with respect to the qualifications of a contractor for public work, as it would be under Justice Fortas' decision which was referred to by Judge Fuld, in connection with a public employee. In fact, I should like to refer to a statement to that effect in People v. Crane, where Judge Cardozo equated contractors and all persons doing public employment, with public employees—and by leave of the Court I would just like to read a few sentences from that statement.

"Chief Judge Fuld: What's the citation?

"Mr. Hessel: People vs. Crane, 214 N.Y. 154, 166-167. Now this is particularly relevant with Justice Fortas' concurring opinion in the Spevack case.

"Van Voorhis, J.: Excuse me for just a second—I don't want to divert you any further—Cardozo also wrote in Campbell vs. City of New York, didn't he?

"Mr. Hessel: That's right.

"Van Voorhis, J.: He said the same thing, but qualified it—"If the constitution does not make it illegal to place this promise in the contract, the claimants may not be heard to insist—"

* Reference to the appendix to this brief will be App. p. .

"Mr. Hessel: I agree.

"Van Voorhis, J.: Now, isn't that a qualification of this—doesn't it go to the point—I'm not suggesting whether this statute is valid or not—but isn't the question here whether it's valid or not, not whether it's a signed contract?

"Mr. Hessel: I agree basically that that's the question.

"Chief Judge Fuld: You're willing to stand, are you not, on the constitutionality of the statute? If it's constitutional, you're in safe waters but if it's unconstitutional you agree—

"Mr. Hessel: I must agree—

"Chief Judge Fuld: And there's no other argument—

"Mr. Hessel: No. We would have no right to insert in the contract a provision—

"Chief Judge Fuld: So you don't rely on—

"Mr. Hessel: —the constitution prohibits. Under the statute—

"Chief Judge Fuld: Excuse me Mr. Hessel. You are saying that if we find it unconstitutional, the statute, that's the end of the case, isn't it?

"Mr. Hessel: I would have to agree." (App. pp. 9a-11a)

And, Samuel A. Hirshowitz, Esq., First Assistant Attorney General, appearing "of counsel" to the Attorney General of the State of New York, agreed with the court as follows:

"Van Voorhis, J.: If the statute which mandated the waiver were void, that would be decisive, wouldn't it. If the statute is valid, there's nothing to it, it's all right; if the statute is invalid then the result comes out the other way, doesn't it?

"Mr. Hirshowitz: If the statute is invalid, of course that's the end of the case, but you have a middle

point here. Supposing a statute is valid, and what's really involved in this case is an argument that you couldn't coerce Campbell into waiving immunity. That's not the question of the validity of the statute." (App. pp. 26a-27a)

The court also decided the second constitutional question presented to it by the Appellant. It held that Appellant's vicarious disqualification caused by the acts of a non-controlling former officer and director did not violate the due process clause of the Fourteenth Amendment, because the statute provided a procedure for discretionary reinstatement which it deemed an adequate and exclusive safeguard against arbitrary, mistaken or unfair disqualification (J.S. p. 19).

Thus, it is obvious that the constitutional questions were properly raised, considered and were the sole questions involved in the court's decision upholding the validity of the state statute.

II

The judgments cannot be supported by independent non-constitutional grounds.

Appellees and the Attorney General contend that Appellant's disqualification is independently supported by contractual provisions regardless of the validity of the statute that mandates their insertion in all public contracts.

This argument, aside from having been abandoned during the oral argument, is indefensible in the face of the well established precedent.

The argument has been phrased in syllogistic terms as follows:

> "* * * if the legislature may withhold a particular benefit, it may grant it in a limited form since the greater power of withholding absolutely must necessarily include the lesser power of granting with restrictions. As a corollary to this argument, the contention is made that the recipient of the benefit is not deprived of a right since he may retain it simply by rejecting the proffered benefit" (Footnotes omitted) *Unconstitutional Conditions,* Note, 73 Harv. L. Rev. 1595, 1596 (1959).

This "logic" has been rejected by courts and its mischief exposed by numerous commentators.

> "The potential erosion of fundamental liberties through the use of this bargaining technique has prompted the development of the doctrine of 'unconstitutional conditions.'" 73 Harv. L. Rev. at p. 1596.

Accord, Willcox, *Invasions of the First Amendment Through Conditional Public Spending,* 41 Cornell L.Q. 12 (1955); Hale, *Unconstitutional Conditions and Constitutional Rights,* 35 Colum. L. Rev. 321 (1935); Merrill, *Unconstitutional Conditions,* 77 U. of Pa. L. Rev. 879 (1929); Thomas Reed Powell, *The Right to Work for the State,* 16 Colum. L. Rev. 99 (1916).

The doctrine of unconstitutional conditions forbids the government's exacting a waiver of important constitutional rights as a condition of its granting a benefit or privilege even though it might not be required to grant any benefit or privilege at all.

This Court stated the doctrine in *Frost* v. *Railroad Commission,* 271 U.S. 583, 593-4, 70 L. ed. 1101, 1102-5, 46 S. Ct. 605 (1926):

> "It is not necessary to challenge the proposition that, as a general rule, the state, having power to deny a privilege altogether, may grant it upon such conditions as it sees fit to impose. But the power of the state in that respect is not unlimited; and *one of the limitations is that it may not impose conditions which require the relinquishment of constitutional rights.*" (Emphasis added.)

Accord, *Sioux Remedy Co.* v. *Cope,* 235 U.S. 197, 59 L. ed. 193, 35 S. Ct. 57 (1914) (statute which forbade use of state courts to foreign corporations unless they subjected themselves to the general jurisdiction of the state by the appointment of a resident agent held to violate the Commerce Clause); *Western Union Tel. Co.* v. *Kansas,* 216 U.S. 1, 54 L. ed. 355, 30 S. Ct. 190 (1910) (excessive tax imposed as a condition of doing business by foreign corporation held to violate the due process and commerce clauses); *Terral* v. *Burke Const. Co.,* 257 U.S. 529, 66 L. ed. 352, 42 S. Ct. 93 (1922) (doing business conditioned on agreement not to remove cases to Federal Courts held to violate Article 3).

Clearly, the contract provisions mandated by statute as a condition of doing business with any public body is not independent of the statute.

III

The judgments appealed from are final.

Appellant's complaint and its petition have both been dismissed. No further state court proceedings either by way of review or otherwise are available in these cases. Consequently, these are final judgments. See Annotation: "When judgment of state court in civil cases is final for purpose of review by Supreme Court of United States". 97 L. ed. 208.

A proceeding for reinstatement, like the possibility of a Governor's pardon for a convict, does not make the disqualification any the less final. As this Court noted in *Joint Anti-Fascist Refugee Comm.* v. *McGrath,* 341 U. S. 123, 159, 95 L. ed. 817, 847, 71 S. Ct. 624 (1951):

> "No lack of finality can be urged. Designation works an immediate substantial harm to the reputations of petitioners."

Appellant claims an absolute right not to have been disqualified under a statute that is unconstitutional. The procedure for reinstatement may have some bearing on whether the statute satisfies due process, but it cannot save the statute from the charge of invalidity as impairing the privilege against self-incrimination.

It falls short even as to due process. It is clear that §2603 was designed for the relief of the public to insure the availability of vital goods and services. It was not designed to cure unfairness to the disqualified company. The refusing officer had completely severed his connec-

tion with Appellant, and everyone else connected with Appellant had cooperated, i.e., agreed to testify. The only other factor in a §2603 proceeding is a rather nebulous notion of public interest. A company unlike General Electric or Westinghouse necessarily is hard pressed to show that the public interest requires reinstatement. Thus it is not a suitable cure for arbitrary or unfair conduct.

IV

Appellant has standing to object to the statute pursuant to which it was disqualified.

Appellant was disqualified because one of its former officers refused to waive his privilege against self-incrimination.

The Attorney General argues that Appellant may not be heard to complain and that only the former officer has standing to object. He thus likens Appellant to the *pruegelknabe* installed by the old Kings of Germany to receive the beating whenever the Prince misbehaved.

The answer to the Attorney General's contention is found in the Supreme Court's decisions in *Pierce* v. *Society of Sisters,* 268 U. S. 510, 69 L. ed. 1070 (1925) and *Joint Anti-Fascist Refugee Comm.* v. *McGrath, supra.*

In *Pierce,* the court said at 268 U. S. 535:

> "Appellees are corporations, and therefore, it is said, they cannot claim for themselves the liberty which the 14th Amendment guarantees. Accepted in the proper sense, this is true. Northwestern Nat. L.

Ins. Co. v. Riggs, 203 U. S. 243, 255, 51 L. ed. 168, 173, 27 Sup. Ct. Rep. 126, 7 Ann. Cas. 1104; Western Turf Asso. v. Greenberg, 204 U. S. 359, 363, 51 L. ed. 520, 522, 27 Sup. Ct. Rep. 384. But they have business and property for which they claim protection. These are threatened with destruction through the unwarranted compulsion which appellants are exercising over present and prospective patrons of their schools. And this court has gone very far to protect against loss threatened by such action. Truax v. Raich, 239 U. S. 33, 60 L. ed. 131, L.R.A.1916D, 545, 36 Sup. Ct. Rep. 7, Ann. Cas. 1917B, 283; Truax v. Corrigan, 257 U. S. 312, 66 L. ed. 254, 27 A.L.R. 375, 42 Sup. Ct. Rep. 124; Terrace v. Thompson, 263 U. S. 197, 68 L. ed. 255, 44 Sup. Ct. Rep. 15."

Indeed, the concurring opinion of Justice Jackson in the *McGrath* case is very relevant here. He said:

> "The Government proceeds on the basis that each of these associations is so identical with its members that the subversive purpose and intents of the one may be attributed to and made conclusive upon the other. Having adopted this procedure in the Executive Department, I think the Government can hardly ask the Judicial Department to deny the standing of the organizations to vindicate its members' rights." (341 U. S. at p. 187)

It is patently absurd to suppose that a corporation has no standing to challenge the validity of a statutory penalty imposed against it.

Conclusion

For the reasons stated above it is respectfully submitted that the motions to dismiss or affirm should be denied.

Respectfully submitted,

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STEPHEN HOCHHAUSER
Of Counsel

Transcript of Oral Argument

STATE OF NEW YORK

COURT OF APPEALS

CLERK'S OFFICE

I, RAYMOND J. CANNON, Clerk of the Court of Appeals of the State of New York, do hereby certify that I have compared the annexed transcript with the tape recording of the argument in the case identified thereon and that the same is a true and correct transcript.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Court of Appeals, at the City of Albany, this Third day of November, A.D., 1967.

RAYMOND J. CANNON
Clerk

[SEAL]

Appendix—Transcript of Oral Argument

In the Matter of

The Application of GEORGE CAMPBELL PAINTING CORP.,
Appellant,

vs.

WILLIAM REID, & ors., &c., & ano.,
Respondents,

For a Review &c.

GEORGE CAMPBELL PAINTING CORP.,
Appellant,

vs.

WILLIAM REID, & ors., &c., & ano.,
Respondents.

The following is the unofficial transcription, taken from a tape recording made of all arguments in the Court of Appeals, of a part of the oral arguments presented in the above-entitled causes before the New York State Court of Appeals on May 15, 1967, and the whole of the arguments made by Paul W. Hessel, Esq., counsel for the respondents, and by Samuel A. Hirshowitz, Esq., Assistant Attorney General of the State of New York, in support of the constitutionality of the statute involved.

"Chief Judge Fuld: Both these cases involve the same points, don't they?

Mr. Hessel: Yes, your Honor.

Chief Judge: The same arguments apply to and are dispositive of both?

Hessel: Yes, your Honor. I haven't dealt with the procedural aspects which have been raised because I believe that section 103-c of the CPLR is completely dispositive of that.

Hessel: May it please the Court—

Chief Judge: Is someone else speaking on your behalf —on your side? Is some other lawyer talking on your—

Hessel: No, your Honor, only the Attorney General, who will address himself to the question of the constitutionality of the statute. While I have made some references to that in a portion of my brief, at the same time I'll leave that argument on the statute to the Attorney General and address myself to the question of constitutionality vis-a-vis this contract which is the basis of the decision of the courts below. In answer to your last question, your Honor, both of these, both this Article 78 proceeding and this plenary action for an injunction, seek exactly the same relief and are decisive on the same set of facts. That is one of the reasons why, in the court below, we raised the question of a pending action—because the Article 78 proceeding was then on appeal. Judge Schweitzer had originally decided that he would stay the plenary action pending the determination of the appeal and the Appellate Division then modified and dismissed it. Now I agree substantially with my worthy opponent on the recital as to the proceedings in the courts below. However, I should like to highlight some additional facts that I think were omitted. In answer to the question as to the nature of the indictment,

there are three contracts that are involved here, all of them signed by George Campbell, Jr., as president of the appellant corporation. The indictment itself is made part of the record—page 66 to 69—of the plenary action. The indictment is based upon three counts of perjury committed by both George Campbell, Jr., and the corporation in falsely swearing that they did not, in connection with the submission of the bids—and this is an affidavit contained in the actual bids—in falsely swearing that they did not collusively prepare their bids in conjunction with other contractors. Now, a fact that I think should be brought to the attention of the Court is this: that it should be clearly understood that the record—that so far as the record is concerned, no constitutional question of any nature was proposed or raised or propounded of that nature. For the first time—when this case went to the Appellate Division is when constitutional questions were raised. I'm not going to address myself to any technical objections as to whether this Court will entertain consideration of a constitutional question if it's not in the record; I'd just as soon get to the merits.

Chief Judge: We agree to entertain it.

Hessel: Well, the point is important because of the manner in which they sought to avoid the penalty or the sanction which was provided for in this contract, a contractual obligation, which they as well as all other bidders assumed, in entering into these contracts, in my opinion precludes them now from raising a constitutional question with respect to this appellant, because all that they did at the time they were faced with the certainty that this sanc-

tion would be invoked under the terms of the contract, was to try to avoid it by a device which no one of the other fourteen or fifteen contractors who were similarly disqualified under the same contract provisions, even attempted, and that was—and I think it is very clear in the record and I don't think my opponent will deny it—it was in contemplation of George Campbell, Jr., being called before the grand jury—knowing he would be called, in fact, after a conversation with the District Attorney to that effect and on the advice of counsel, that he not only resigned as an officer and director, but he gave up all of his stock and every financial interest in this corporation whatsoever. So at the time he was called upon to waive immunity and testify before the grand jury, this was the result, by their own action. George Campbell, Jr., was then, on April 14th, when he was called before the Grand Jury, a stranger to this corporation. He was not an officer, he was not a director; he was not a stockholder; he had divorced himself from all financial interest. So that any compulsion upon him, when he was required to waive immunity, any requirement that he waive the Fifth Amendment, was one that he had complete choice either to adhere to or deny or to reject, but there was no economic sanction possible against him, because he had no interest in this corporation. As far as the corporation was concerned, they had no personal relationship with George Campbell, Jr., so that they could on his behalf invoke the constitutional issue. More than that, the New York City Housing Authority is a public corporation and it operates under the Public Housing Law. Like any other corporation, it has certain rights

and privileges and obligations. So far as its right to contract is concerned, it has substantially all of the same rights as any private corporation, with certain limitations. In fact, the statute, the Public Housing Law, says that the New York City Housing Authority may make and execute contracts and other instruments necessary and convenient to the exercise of its powers, the same as a private corporation. But, further than that, these contracts may be in such form and contain such terms and provisions as may be deemed advisable by the Authority. But there is something else in the Public Housing Law that I think merits very serious attention. While, of course, it is probably inherent in every public agency to accept or reject the contractor upon a determination as to whether he is responsible or not, whether financially, morally or otherwise, the public housing law makes it very clear that so far as a housing authority is concerned, an authority may make rules and regulations governing the qualifications of bidders. I ask the Court to keep that in mind with respect to the further arguments I make. Now, our position is, if the Court please, that whether there had been a statute or not, under the rights granted to it under the Public Housing Law and its inherent rights as a corporation, public or private, this authority could have provided in its contract the provisions set forth in section 38 which is the critical provision of these contracts in issue here. Not only that, but in writing those provisions, it specifically provided for a disqualification under certain conditions, and conversely that means a qualification, rule or regulation within the purview of the Public Housing Law.

Van Voorhis, J.: But was there any voluntary choice here upon the part of the contractor?

Mr. Hessel: I say there was, your Honor. Because it applied not only to this contractor but to all contractors.

Van Voorhis, J.: You mean the choice was to bid or not to bid?

Mr. Hessel: To bid or not to bid, and I'm going to refer to cases decided both by this court and elsewhere, which point out—

Van Voorhis, J.: Suppose for example you said the authority could put in the clause even if it weren't in the statute, suppose just in order to take an extreme case, the authority had said in the specifications that contracts could only be made with painters if they would agree to discriminate on a racial basis as to their employees. Would you say that this is a matter of take it or leave it—that the voluntary choice was to enter into such a contract or not to enter into it—and then assuming that that regulation was illegal, that it nevertheless would be binding on them because they assumed it on a voluntary basis?

Mr. Hessel: Your Honor, I'll answer it this way—I would say that would not be proper, it would be illegal. I don't say any right—

Van Voorhis, J.: Well, if this is illegal—don't you say it doesn't matter because they voluntarily agreed to it as part of the contract.

Mr. Hessel: I say by the fact that they voluntarily agreed, this took away the compulsion that they claimed they were under to waive immunity. Of course, in this the individual is the boss but nevertheless—assuming now, this

corporation itself, if a corporation can be compelled to waive immunity—

Van Voorhis, J.: The argument that they signed the contract and agreed to this voluntarily is, I suppose, subject to whether the clause is illegal or not.

Mr. Hessel: I agree with that, your Honor—I'll agree to that. In fact, I may say that my opponent—

Van Voorhis, J.: By legal I mean constitutional.

Mr. Hessel: That's right, constitutional. And really, the only pertinent argument in my opinion that's made with respect to constitutionality here, is what they have labelled their reply brief, which I received only Friday, and from what research I've been able to do on it, I'll give you the answers to that. And that is where they raise the question of the so-called doctrine of unconstitutional condition, and I think that's what your Honor has reference to. While it is, of course, easy to say as was said in the Campbell case which I cited in my brief, decided by this Court, the case of Atkins against the State, it was a Supreme Court case, also cited in the brief, there is broad language to the effect that whether it's a private contract or a public contract, you take it or leave it upon the terms and conditions offered. But in all cases where such a broad brush is used, there are always exceptions and limitations and I'll be the first to agree to that. Even in a private contract, you cannot have matters in there which are against public policy or a violation of statute. The fact that this contract happened to be mandated by a statute, doesn't make it any the less a matter of private contractual agreement—

Van Voorhis, J.: Not if the statute is valid. But if the statute is invalid, then what?

Mr. Hessel: Well, if the statute is invalid? I would say that if the statute mandating it is invalid, then of course the agreement which is in the same terms must necessarily also be found invalid, but when it comes to the question of voluntariness, then I say the fact that it was adopted by private contract is a matter of voluntary action upon the part of the—

Van Voorhis, J.: Even though they couldn't bid at all unless they bid it subject to—subject to, and this is arguendo—an unconstitutional condition?

Mr. Hessel: That's right.

Van Voorhis, J.: I still don't see—according to that then they can only bid if they agree to discriminate racially among employees. You say that would be valid because they voluntarily subscribed to it.

Mr. Hessel: No, I would say that—

Van Voorhis, J.: I don't see how you can escape from that conclusion. I only cite that as an illustration, of course.

Mr. Hessel: Even if this were a private contract and it provided for discrimination which is contrary to law or statute, it would have been invalid. The fact that it—

Van Voorhis, J.: Suppose this statute is contrary to the constitution, then you say it becomes valid because the contract was voluntarily signed and it didn't have to be—

Mr. Hessel: No, I'm not saying that, your Honor.

Van Voorhis, J.: Doesn't it add up to that?

Mr. Hessel: What I'm saying is that this statute, like the statutes which provide for discharge of pubilc employ-

ees in the event of their failure to testify as to the narrow questions relating to their employment, is just as valid with respect to the qualifications of a contractor for public work, as it would be under Justice Fortas' decision which was referred to by Judge Fuld, in connection with a public employee. In fact, I should like to refer to a statement to that effect in People v. Crane, where Judge Cardozo equated contractors and all persons doing public employment, with public employees—and by leave of the Court I would just like to read a few sentences from that statement.

Chief Judge Fuld: What's the citation?

Mr. Hessel: People vs. Crane, 214 N.Y. 154, 166-167. Now this is particularly relevant with Justice Fortas' concurring opinion in the Spevack case.

Van Voorhis, J.: Excuse me for just a second—I don't want to divert you any further—Cardozo also wrote in Campbell vs. City of New York, didn't he?

Mr. Hessel: That's right.

Van Voorhis, J.: He said the same thing, but qualified it—"If the constitution does not make it illegal to place this promise in the contract, the claimants may not be heard to insist—"

Mr. Hessel: I agree.

Van Voorhis, J.: Now, isn't that a qualification of this —doesn't it go to the point—I'm not suggesting whether this statute is valid or not—but isn't the question here whether it's valid or not, not whether it's a signed contract?

Mr. Hessel: I agree basically that that's the question.

Chief Judge Fuld: You're willing to stand, are you not, on the constitutionality of the statute? If it's constitutional, you're in safe waters but if it's unconstitutional you agree—

Mr. Hessel: I must agree—

Chief Judge Fuld: And there's no other argument—

Mr. Hessel: No. We would have no right to insert in the contract a provision—

Chief Judge Fuld: So you don't rely on—

Mr. Hessel: —the constitution prohibits. Under the statute—

Chief Judge Fuld: Excuse me Mr. Hessel. You are saying that if we find it unconstitutional, the statute, that's the end of the case, isn't it?

Mr. Hessel: I would have to agree.

Chief Judge Fuld: Yes—I think Judge VanVoorhis misunderstood you.

Mr. Hessel: That's right.

Chief Judge Fuld: Or you misunderstood him.

Mr. Hessel: Now is the Court interested in hearing—

Chief Judge Fuld: No.

Mr. Hessel: All right. If the issue of the constitutionality of the statute is properly before the Court, then I'll leave it to the Attorney General to discuss the statute so far as that is concerned. My point with respect to the contract, however, is that in determining the constitutionality of the state, the fact that it provided, not for a statutory imposition directly, or mandate, even, like the statutes with respect to public employees, but has provided for a contractual provision where a voluntary undertaking of such an obligation would be undertaken. That would

in effect be very persuasive on the question whether this contract and the statute are constitutional, particularly under Justice Fortas' distinction, between disbarment of an attorney, who is not a public employee, and a public employee, with whom I say this court itself has equated all public contractors and persons doing public work. Now in the Court below, we devoted our entire consideration and argument to the question of interpretation of both the statute and the contract, and that is as to whether this resignation—assuming the constitutionality because no such question was raised—that is, their claim was that the Authority breached this contract, and you will see by their notice of claim which they were required to file after the dismissal of their first action, that they claim, and the Authority's letter of disqualification so specifies, that this was done under and by virtue of the contract. A claim that the interpretation of the contract should have been such that the resignation of George Campbell just prior to his being called before the Grand Jury forbade the authority from invoking the sanction because he was not an officer at the time that he was so called before the Grand Jury.

Now, on that question of interpretation, the whole case hinged in the Supreme Court. It was the court's decision that that did not preclude—it was not a proper interpretation either of the statute or of the contract. So all that is involved here is interpretation. Now we go further in our opposition to their application. We said, and we say here, that this statute, unlike others, like the public employees' statutes—like section 1123 of the charter which

I think your Honors are going to contend with here on this calendar today—and like section 903 which was before the court in the Slochower case—does not provide that the contractor shall be automaticallly dismissed without any means of relief. There's a section 2603 in this statute, following 2601 and 2602, which gives them not only an administrative right to a hearing and relief from the disqualification or cancellation of this contract, but it gives them judicial relief—

Van Voorhis, J.: What's that hearing on? You can't raise the constitutionality of the statute on such a hearing, can you? It's only on whether you did or did not waive immunity or something of that kind, that could be determined there.

Mr. Hessel: Well, I think I'll agree with the Attorney General and District Attorney who has filed a brief amicus curiae here, that that question on a judicial hearing and any question could be raised but even if the constitutionality itself could not be raised, I say the relief afforded him—the provision that he could go into the Supreme Court within days after his disqualification, obtain a stay and get a full judicial hearing on the propriety of his disqualification—this is a very important—

Van Voorhis, J.: He would go in under the very statute whose constitutionality he disputed, wouldn't he?

Mr. Hessel: I say by virtue of the fact he could obtain relief from that sanction—

Van Voorhis, J.: Could he obtain the relief declaring that the statute which created the hearing was invalid?

Mr. Hessel: Well, I believe in the judicial hearings it could be so determined. But even if it couldn't be so determined, the very fact that he was afforded a summary remedy to avoid, in a proper case, the sanction invoked, would help to sustain the constitutionality of the statute. Now, in the case of public employees, there is no provision for such a hearing, and yet that has been sustained. And Justice Fortas has so said. And in the Slochower case, it was indicated that if the questions had been directed by the Board of Education to his particular work, that it would have been proper to fire him as was done.

Now, one more point I'm going to make, your Honors, and then I'll sit down and let the Attorney General discuss the question of constitutionality. It must be remembered that we have here first a plenary action for an injunction and the other is an Article 78 proceeding for precisely the same relief. Now what do they want to do? They want to enjoin the Authority from disqualifying it for any period at all. They want an immediate injunction to lift the disqualification right now. Now, I have already adverted to the indictment pending against this contractor and George Campbell, Jr., with respect to the very contracts in issue here. It has been decided by the courts of this State that while admitting that an indictment is only an accusation, not a conviction, yet that would probably be taken into consideration in deciding whether a contractor is a responsible or qualified bidder. That's the Cesara case and several other cases that follow it, cited in our brief. Now if that's the case, certainly the court, in equity, would not summarily enjoin the Authority despite the pending indictment and

compel them to do business with a contractor who was under that kind of a cloud. Thank you, your Honors, for your attention. I'll turn it over to the Attorney General.

Samuel A. Hirshowitz, Assistant Attorney General of the State of New York:

Chief Judge Fuld: You don't require all that time to establish the constitutionality of the statute, do you?

Mr. Hirshowitz: No. I don't think so. Let me say first that the same question, involving a parallel statute under the General Municipal Law, is the subject of litigation in the Federal Court in the case of Holland v. Holtsinger, and I spent a full day before a three judge panel with the District Attorney and a corporation counsel arguing the constitutionality of that statute. There's been no decision in that case.

Van Voorhis, J.: I suppose that General Electric, Westinghouse and Allis-Chalmers and the other seventeen electrical equipment companies that were found guilty of price fixing and collusive bidding are precluded by this statute, in the municipalities where this occurred, from putting in any bids?

Mr. Hirshowitz: Well, not by this statute, your Honor, because they weren't parties to any contracts. There was an opinion of the Attorney General a number of years ago—

Van Voorhis, J.: The statute is read into the contract even if they don't write it in, isn't it?

Mr. Hirshowitz: There's no contract with the State or city involved with General Electric or General Motors. The statute merely says that if an officer of the corporation is called before a grand jury and refuses to waive—a lim-

ited waiver of immunity—the contracting agency—in this case the Housing Authority—can disqualify the company or the corporation from bidding for future contracts for the next five years.

Van Voorhis, J.: Apparently, then, it's not disqualified because it's engaged in collusive bidding—it's disqualified because it refused to waive before the grand jury.

Mr. Hirshowitz: No sir. They're disqualified because they refused to furnish the information to the State or city authorities with respect to their performance of the contract.

Van Voorhis, J.: If the information proved to be very damaging, why, then they could still bid.

Mr. Hirshowitz: I didn't get that.

Van Voorhis, J.: If the information as disclosed by the officer testifying before the Grand Jury proved to be very damaging—proved very evil conduct, let us say—then they could still bid, but if they didn't testify and it was—no matter what the conduct was then they—

Mr. Hirshowitz: If the information as disclosed either before the grand jury or before any other investigating agency, or before the purchasing authority itself, proved to be damaging the purchasing agency would have the discretion, as held in a number of cases, not to take the bid because the bidder would be established as being not a responsible person, but that would be entirely apart from this statute.

Van Voorhis, J.: If you had enough of these people who were engaged in collusive bidding, and they're all disqualified, why then I suppose the rest would have a monopoly, is that so?

Mr. Hirshowitz: Well, I can't imagine—take the milk industry which we argued before District Court—there are over 300 milk companies—I can't imagine all the 300 milk companies engaged in collusive bidding—

Van Voorhis, J.: I mean, the operation of this statute depends upon how many contractors there are in the field, I take it. If there aren't very many, why then it couldn't be enforced without having business come to a standstill.

Mr. Hirshowitz: If there weren't many contractors I'm sure that, if a number of bidders were disqualified, other persons would come into that business and bid for the public business.

Van Voorhis, J.: Like General Electric and Westinghouse and Allis-Chalmers.

Mr. Hirshowitz: Well, I don't like to pick General Electric or Westinghouse out for any reason.

Van Voorhis, J.: It wouldn't be so easy for another to go into that—of course, they can go into the painting business—but then I suppose the principle is different depending on whether or not it's possible for a newcomer to establish himself quickly in the business?

Mr. Hirshowitz: We have no investigation of General Electric and therefore they haven't been called before a grand jury, your Honor, and I don't know that any of the officers of General Electric or Westinghouse would refuse to waive if they were called before the grand jury and if they had public contracts.

Van Voorhis, J.: Well, I think they got down on their knees and confessed, as I recall it.

Mr. Hirshowitz: There is another provision in the Public Authorities Law as well as in the other companion statutes, Judge, which was briefly referred to by my associate here from the Housing Authority. The bidder must certify that he or it has not engaged in any collusion—that's, I think, in this law, 2604.

Van Voorhis, J.: Apparently my questions have gone a little afield but I wanted to get a little background or philosophy or thinking on this to try to get at what is essentially involved here.

Mr. Hirshowitz: I just want to repeat before I develop my thoughts, that the disqualification is for failure to furnish information to the Public Authorities on the performance of the particular contract—it doesn't go into any personalities. Did you engage in collusion or bid rigging with reference to the contracts that you signed with, in this case, the Housing Authority?

Keating, J.: There were fourteen or fifteen disqualified here, weren't there?

Mr. Hirshowitz: Yes your Honor.

Keating, J.: Out of how many bidding on the contract?

Mr. Hirshowitz: I don't know, maybe the Housing Authority knows.

Keating, J.: Well, may I ask the attorney for the Housing Authority how many bidders are there in all who were not disqualified?

Mr. Hessel: Well, your Honor, at least twenty or thirty, and since these disqualifications which are, of course, a major matter with the newspapers, you probably had another thirty or forty come into the business. We

just canvassed the whole redbook in all of New York and got plenty of bidders.

Chief Judge Fuld: Will you now confine your argument to the constitutional question?

Mr. Hirshowitz: The problem with respect to one of the questions Judge Van Voorhis asked about this waiver of a constitutional right. Now, the way the case arises causes a little confusion. As my associate pointed out at Special Term, and in the papers that you have before you, no constitutional question at all was raised. Now, like Topsy, the constitutional question has been increasing as we go from court to court. Now in the Appellate Division the major argument of the appellant was—and that's where the contract came in—that since Campbell was no longer an officer of the corporation, when he made the refusal, the corporation was entirely disassociated from his refusal and was innocent of all wrongdoing—

Chief Judge Fuld: This has nothing to do with the constitutionality of the statute—

Mr. Hirshowitz: No, but they said it was unconstitutional—

Chief Judge Fuld: I thought you were limiting yourself—

Mr. Hirshowitz: I'm just trying to explain to Judge Van Voorhis how the Appellate Division decided—that they decided the only question they had before them which was a question of whether it was unconstitutional to bar the corporation when Campbell was no longer an officer. There's been a great deal of discussion—

Van Voorhis, J.: I understand that argument, I'm aware of this.

Mr. Hirshowitz: There's been a great deal of discussion about the Garrity and the Spevack cases. And in all the courts everybody is using the Garrity and Spevack cases. The appellant seems to feel that these cases have completely destroyed the power of the State or the city to demand candor of its public contractors and to refuse to do business with contractors who refuse such candor. Now on the contrary—

Chief Judge Fuld: Can the State take from a party the right to assert a constitutional privilege?

Mr. Hirshowitz: Yes, your Honor. There are cases on that, I'm just going to reach that in a minute—

Chief Judge Fuld: Well, get to that, that's the important point, isn't it?

Mr. Hirshowitz: Yes. I'll reach that. Now, on the contrary, it's our view that these cases have not destroyed that power and haven't undermined the holding in the Laino case and I want to refer to that case very briefly because it went through this court and I'm sure Judge Fuld, you're familiar with it. In that case, an officer of the corporation which held a public contract was indicted for a substantive crime which was disclosed in the course of his testimony before the grand jury, and the case went through the court here and the conviction was affirmed and then Mr. Laino went into the Federal court and sued out a writ of habeas corpus. In his papers he said that he had raised before the trial court the question of the validity of the statute which was 103, I think "b", of the General Municipal Law which is substantially identical with this statute. Judge Feinberg, District Judge Feinberg, heard the writ originally and he sent it back to Judge Fuld for reargu-

ment, to clarify it. Then it came back to the District Court and Judge Kenney wrote a long opinion and he did two things, so far as we're concerned here: He upheld the conviction of Laino—that was number one—but he also answered the argument that the statements made by Laino before the Grand Jury amounted to a coerced confession and therefore were improperly used to convict him. He expressly upheld the validity of the statute—103-b of the General Municipal Law—and in a long opinion he equated the 103-b status of a public contractor with the status of public employee. Since that time, the Garrity case has come along. The Garrity case holds this—if you equate it to the public contractor—it says: the man, who appeared before the Grand Jury on a limited waiver of immunity—in that case a public employee—and makes a statement, cannot be convicted on the basis of that statement, but it also says the statements may be used against him in connection with any disciplinary proceeding, and in this case they can be used against them with reference to determining responsibility and moral worth of the contractor.

Keating, J.: That is, you claim, that anything that he said in this proceeding, elicited by the Housing Authority could not be used in the criminal action.

Mr. Hirshowitz: That appears to be the holding in the Garrity case, your Honor. In this case, however, no such testimony was obtained. Even if Campbell had testified, the corporation could not challenge the use of such testimony since it has no privilege against self-incrimination, and we have a number of cases in our brief on that. Now the appellants in their reply brief pick up old cases decided before 1930, such as referred to by my friend here—the

counsel for the appellant—the Pierce case and the Truax case. They have nothing to do with this case. They involve the question of whether you have standing to bring an action. This is the question—whether you have standing to challenge the use of—the application of the Fifth Amendment. I think more analogous than those cases is a case that I just read—People v. Portelli, 15 NY 2d 235, which was decided by this Court.

Chief Judge Fuld: It has very little to do with this problem.

Mr. Hirshowitz: I know, but the analogy is this, the District Attorney of Kings County successfully contended that a witness who had been coerced into confessing could testify at the trial against his associate in the crime and that the defendant in such case had no standing to bar such confession because of the coercion.

Chief Judge Fuld: I thought you were talking—aren't you going to talk to the constitutionality of the statute?

Mr. Hirshowitz: Yes, your Honor.

Chief Judge Fuld: Your time is almost up—

Mr. Hirshowitz: But I'm also talking on the question of standing, your Honor.

Chief Judge Fuld: Your time is almost up.

Mr. Hirshowitz: In the Garrity case there were five judges for the majority and four dissenters. In the Spevack case, again, there were five judges for the majority and four dissenters. But as it was pointed out in the preceding argument, the fifth judge is the one that made up the majority in Spevack and Garrity and took occasion in the course of a separate opinion to refer to the fact that this court has never held, for example, that a policeman may

not be discharged for refusal in a disciplinary proceeding to testify as to his conduct as a police officer. Now, Judge Douglas, in a footnote in the Garrity case, said, "We're not passing on that question." In a previous case which we have referred to in our brief, the Stevens case, he also says he wasn't passing on it. So there's no holding by the U. S. Supreme Court, even in Garrity or Spevack, that a public contractor who is equated with a public employee may not be disciplined—if that's the word—for a refusing to furnish information to the public officials when called upon. It is the duty of this Court to follow the opinions of the Supreme Court but I submit it is not the duty of this Court to extend the opinions of the Supreme Court beyond the holdings in such cases. Neither in the Spevack case nor in the Garrity case was any statute upset. Contrary to the appellant's statement in its reply brief, and on the argument here, the Supreme Court dismissed the appeal in the Garrity case and decided the case on certiorari so the statute of New Jersey was not upset. The reason why we say that is, that the New Jersey court from which the Garrity case came, in addition to upholding the conviction of the policemen in that case, also upheld in an extensive opinion the constitutionality of the New Jersey statute with respect to them. Now in the Spevack case, which, as I said, there was no statute present, the Spevack case was simply an application by the New York court of what it considered the responsibility of an attorney as an officer of the court. In Spevack, the attorney was stripped of his license to practice law and therefore of his professional livelihood because of his invocation of the privilege.

Chief Judge Fuld: But here the corporation is stripped of its ability to get a job with the state, or the state Housing Authority.

Mr. Hirshowitz: This is different. In this case here the corporation is not stripped of its authority to run the painting business. According to our friends on the other side, they have a million dollar business. They can continue the painting business indefinitely. Moreover, as far as—

Van Voorhis, J.: Sooner or later, everybody will be working for the State and once you can't contract with the State, it puts a bad crimp in your ability to do business.

Mr. Hirshowitz: I would say there's still enough painting business around, your Honor, without respect to the State or any public official or public agency.

Van Voorhis, J.: This is a very vital part of the business of any contractor—I mean the possibility of bidding on these State jobs—

Mr. Hirshowitz: May I say that you haven't got before your Honor at present—. The part of the statute that says the contracts can be cancelled is not before this court because that's the subject of a million dollar damage action by Campbell against the Housing Authority. What's before the court is simply the question whether future bidding —and this is the same question as to whether you apply for something—you haven't got a property right there—whereas in the Spevack case, the court, in the majority opinion—

Van Voorhis, J.: Well, you do have a right to do business in a normal way, don't you? I mean there is a property right that people have to do business, isn't that so?

Mr. Hirshowitz: Yes, that's right, but you have to do business—

Scileppi, J.: You have to meet the requirements—

Mr. Hirshowitz: Yes. You have to furnish—Supposing you apply for a motor vehicle license. You have to furnish information. We had a case before this court—

Van Voorhis, J.: Yes, but this relates to future bidding. On the assumption that it may be perfectly legal, but they're bad people and so they're not allowed. I mean, that's the philosophy behind this, isn't it?

Mr. Hirshowitz: Yes. In addition, as my associate pointed out, in addition to disqualifying from future bidding, there is a section, 2603, which gives the painting company in this case the right to apply to remove the disqualification for any reason whatsoever.

Scileppi, J.: It's done as a matter of public policy, isn't it? Isn't it done as a matter of public policy, where they refuse to permit them to bid because of their method of operation?

Mr. Hirshowitz: In the Laino case, Judge Kenney points out the vital public policy that's involved on the enactment of this precautionary statute.

Van Voorhis, J.: But this is not punishing them for something that they have done, is it? It's because, on account of something that they've done, they are branded as unfit for the indefinite future, at least for five years—

Mr. Hirshowitz: That's simply—

Van Voorhis, J.: That's vastly different from punishing a person for something he had done where he may discharge his debt to society. Here you could never dis-

charge your debt to society unless you go into another business, isn't that so?

Mr. Hirshowitz: Now, assuming that the contractor has not permitted any bid rigging or collusion, there's no problem. This merely requires him to do what he has to do when he fills out an application for a license of any kind. We had a case before this Court, the Kemp case, where the applicant for a license filled out an application which showed he had been convicted previously and the question was raised as to whether the license could be refused on the basis of the statements in the application. The Supreme Court dismissed an appeal from that just at the last term. Now on this question of waiver, I just want to take a minute your Honors. We have a number of cases in our brief. This is not the question that Judge VanVoorhis suggested as to whether if you had a provision in the contract about discrimination, whether that would be binding on the person who signed the contract. This is not the question at all before this Court. The question is, if you have a constitutional right, have you got a right to waive that constitutional right? And the cases that we cite in our brief say you have a right to do that. And in the reply brief, there are a number of cases—

Van Voorhis, J.: If the statute which mandated the waiver were void, that would be decisive, wouldn't it. If the statute is valid, there's nothing to it, it's all right; if the statute is invalid then the result comes out the other way, doesn't it?

Mr. Hirshowitz: If the statute is invalid, of course that's the end of the case, but you have a middle point

here. Supposing a statute is valid, and what's really involved in this case is an argument that you couldn't coerce Campbell into waiving immunity. That's not the question of the validity of the statute. Now I just want to on this question of waiver—we cited a case—they have about five or six cases which have nothing to do with the case before you—we cited a case out of this court, the Sheppard case, a case out of the United States Supreme Court, 1946, it is an elementary rule of constitutional law that one may not retain the benefits of the act while attacking the constitutionality of one of its important conditions. I think the statute is constitutional and the rest we leave to our brief."

* * *



SUPREME COURT, U. S.
FILED
MAR 9 1968
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1967

No 673

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Appellant,

against

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Appellees.

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On Appeal from the Court of Appeals of the State of New York

APPELLANT'S BRIEF

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APPELLANT'S BRIEF

Opinions Below

The official and unofficial reports of the opinions delivered in the Courts below are as follows:

Special proceeding commenced pursuant to CPLR Article 78:

48 Misc. 2d 544, 265 N.Y.S.2d 304 (Supreme Court, N.Y. Co. 1966); affirmed, 275 N.Y.S.2d 363 (Appellate Division, First Department, 1966) (not officially reported); affirmed, 20 N.Y.2d 370, 283 N.Y.S.2d 31, 229 N.E.2d 602 (Court of Appeals, 1967).

Plenary action:

The opinion of the Supreme Court, New York County (Schweitzer, J.), is unofficially reported in the New York Law Journal of March 8, 1966; modified, 26 A.D.2d 912, 275 N.Y.S.2d 365 (Appellate Division, First Department, 1966); affirmed, 20 N.Y.2d 370, 283 N.Y.S.2d 31, 229 N.E.2d 602 (Court of Appeals, 1967).

Jurisdiction

In both cases jurisdiction of this Court is conferred by 28 U.S.C. §1257(2). The validity of a state statute, Public Authorities Law, §§2601-2, was challenged as being repugnant to the 14th Amendment provisions dealing with the privilege against self-incrimination and due process. The State Courts upheld the validity of the statute.

The judgment sought to be reviewed was made and entered on July 7, 1967 by the New York State Court of Appeals. Notices of appeal were duly filed on September 18, 1967. The Jurisdictional Statement was submitted on October 2, 1967, and on January 29, 1968 probable jurisdiction was noted in this Court.

Constitutional Provisions and Statutes Involved

The complete text of §§2601-3 of the New York State Public Authorities Law, §§253, 253-a and 258 of the New York State Code of Criminal Procedure, §2447 of the New York State Penal Law, and the 14th Amendment are set forth in the Appendix to this Brief. Sections 2601-3 of the Public Authorities Law is published in McKinney's Consolidated Laws of New York Annotated, Book 42, Part II, pages 415 through 417. Sections 253, 253-a and 258 of the Code of Criminal Procedure is published in McKinney's Consolidated Laws of New York Annotated, Book 66, Part I, pages 497, 511 and 142-3 of the 1967 Cumulative Annual Pocket Part. Section 2447 of the Penal Law is published in McKinney's Consolidated Laws of New York Annotated, Book 39, 1966 Cumulative Annual Pocket Part, pages 355-6. The text of the 14th Amendment is published in U.S.C.A. Constitution, page 288.

Questions Presented

1. Whether the 14th Amendment is offended by New York State's Public Authorities Law, §§2601-2, which require the disqualification of a corporation from eligibility to bid on public contracts when one of its officers or directors asserts or refuses to waive his privilege against self-incrimination before a grand jury?

(a) If not, does the fact that the recalcitrant witness resigned his office and surrendered his control of the company's affairs prior to being called as a witness make the application of the statute against the corporation repugnant to the due process clause of the 14th Amendment?

2. Whether New York State's statutory requirement, Public Authorities Law §2601, that all public contracts contain an agreement to waive the privilege against self-incrimination, is an unconstitutional condition of doing business with the state and its agencies?

Statement of Facts

Appellant corporation has been disqualified by appellees from bidding on public contracts for five years (A16-17; 57-58).* Appellees purported to act pursuant to the provisions required by §2601 of the Public Authorities Law (App. 21) to be included as clauses (A80) in their agreements with the appellant to paint several of appellees' buildings. Those provisions state that when a person refuses to testify or sign a waiver of immunity when called by a Grand Jury investigating any transaction had with the State:

> "Such a person and any firm, partnership, or corporation of which he is a member, partner, director or officer shall be disqualified from thereafter selling or submitting bids to or receiving awards from or entering into any contracts with the Authority for goods, work or services, for a period of five years after such refusal" (A80) (App. 21).

On April 20, 1965 all of the officers and directors of appellant who were asked, signed waivers of immunity and testified (A6; 53). Yet, all of those officers and directors as well as some 180 employees are now actually disqualified,

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* Reference to the Appendix is designated "A" followed by the page number. Reference to the Appendix to this Brief which contains the relevant statutes is designated "App." followed by the page number.

individually and collectively, for five years from bidding on public contracts.

The sanction was imposed against appellant because on April 14, 1965, George Campbell, Jr., who at the time was neither an officer, director nor stockholder of appellant, refused, when asked, to sign a waiver of his privilege against self-incrimination (A4, 14-17; 52, 55-62, 71-73, 119-121). He was not questioned by the Grand Jury.

He was one of five children of George Campbell, Sr., appellant's founder. Each child had held an equal minority stock interest (A3-4; 64). In August, 1964, when his father died, George Campbell, Jr., was designated President of appellant and signed all corporate papers as such (A4; 67, 119). However, at the time he was only recently out of college, had less than one year's experience in the painting business, and was not actually in control of its affairs (A119-121). The *de facto* operating head of the appellant was George Morvan, who has since been named its President (A119-121).

When appellant's officers and directors learned that a Grand Jury investigation was being conducted, they were advised by their counsel that each might be called as a witness (A52). They were further advised that each might be requested to execute a waiver of the immunity conferred by §2447 of the Penal Law (App. 28-30), and were told of the disqualification provisions of the Public Authorities Law (A52).

With the exception of George Campbell, Jr., all of the officers and directors of appellant were anxious to cooperate

in full with the Grand Jury investigation (A6-7; 52-53). For personal and individual reasons (A5; 52) George Campbell, Jr., did not wish to testify without obtaining the statutory grant of immunity under the Penal Law, §2447 (App. 28-30).

In view of his attitude and because he did not want his personal attitude to reflect on the other stockholders, officers and directors, many of whom derived their livelihood from appellant, George Campbell, Jr., on March 26, 1965, submitted his resignation as an officer and director, and surrendered his minority stock interest (A4, 52; 120-121).

There can be no question but that on April 13, 1965, when George Campbell, Jr., was summoned, and on April 14, 1965, when he refused to sign a waiver of immunity, he was neither an officer, director nor stockholder of appellant (A14-15; 55-56). Appellees have never seriously disputed this. Indeed, in appellees' motion to this Court to dismiss the appeal (pp. 12, 19-21), they stressed the fact that, at that time, George Campbell, Jr., was a complete stranger to appellant.

It is significant that since George Campbell, Jr., was never asked a single question by the Grand Jury or any duly constituted board of responsibility, it is obvious that he never refused to answer a single question. Moreover, all of the controlling officers, directors and stockholders did cooperate (A6-7; 52-3). On April 20, 1965, George Morvan, then appellant's Executive Vice President and a Director; Ernest Ponte, a Vice President and husband of Anita Campbell Ponte, a Director and 10% shareholder; Theodore Ruzow, a Director and Co-Executor of the E[illegible]

of George Campbell, Sr., which owns 50% of the stock of appellant; Marian Campbell Rizzi, Secretary and a Director of appellant, and a 10% shareholder; and Elizabeth Campbell, the widow of George Campbell, Sr., Co-Executrix of his Estate, Treasurer and a Director of appellant; were all requested to appear before the Grand Jury (A6-7; 52-53). Each of them appeared voluntarily and advised the Assistant District Attorney that he (or she) would sign waivers of immunity (A6). Only George Morvan, Theodore Ruzow and Ernest Ponte were asked to appear before the Grand Jury (A6). Marian Campbell Rizzi and Elizabeth Campbell were excused by the Grand Jury and were not asked to testify (A6).

In spite of this, appellant was disqualified on April 21, 1965 (A16-17; 57-58). When appellant learned of its being blacklisted, its attorneys wrote to appellees stating that although George Campbell, Jr. had refused to sign a waiver of immunity, he had, as appellees well knew (A56), resigned as an officer, director and stockholder, and that all the other officers and directors of appellant, who had been requested to appear, had voluntarily appeared without subpoena and had voluntarily signed waivers of immunity (A19-22; 59-62). Appellant requested appellees to consider their action and, by subsequent telegram, asked for a hearing (A22). On May 5, 1965, appellees responded, stating that there was no point to any further discussion of the matter (A23).

Proceedings Below

Appellant commenced a proceeding to review the administrative determination of disqualification. The determination was asserted to have been erroneous as a matter of fact in deeming George Campbell, Jr. to have been an officer or director when he refused to sign a waiver of immunity, or as a matter of law in applying the statute to disqualify a corporation because of the acts of a former officer or director (A24-26). On motion of the appellees, the proceeding was dismissed with leave to commence a plenary action for breach of contract (A30-34). Such an action was commenced (A63-74). Both are here on appeal from final determinations dismissing them on the merits (A39-43; 132-136).

Summary of Argument

Appellant presents three contentions. The first is that the 14th Amendment prohibits economic sanctions being visited upon a person solely because he has asserted his privilege against self-incrimination (Argument I).

The second is that due process is offended by the imposition of sanctions against a corporation charged with lack of candor, even though the recalcitrant witness resigned his offices and surrendered his stock when the corporation learned that he was planning to refuse to cooperate (Argument II).

The third is that the State may not require, as a condition of doing public business, that persons bargain away their privilege against self-incrimination in advance (Argument III).

ARGUMENT I

The economic sanction imposed by the New York State Public Authorities Law against appellant is repugnant to and prohibited by the Fourteenth Amendment.

Appellant is an officially blacklisted corporation. It is barred from submitting bids on any public contracts in New York State (A16-17; 57-58). The stigma, moreover, has also resulted in the loss of substantial private and out-of-state business (A69-70).

The reason ascribed for the blacklisting is the refusal by one of appellant's former officers to waive his privilege against self-incrimination. Appellant contends that the blacklisting is prohibited by the 14th Amendment as interpreted and applied by this Court for many years.

A. The Test Prior to *Spevack*: Due Process

In 1956, this Court held that the denial or termination of a public contract, employment or license solely because the applicant or holder exercised his privilege against self-incrimination was arbitrary, and therefore a denial of due process. *Slochower* v. *Board of Education*, 350 U. S. 551, 100 L.ed.2d 692, 76 S.Ct. 637 (1956). The Court reasoned that the sanction was arbitrary since the statute operated summarily without reference to the subject matter of the questions asked, the reason for the exercise of the privilege, or whether the inquiry was even related to the fitness or qualifications of the applicant (350 U. S. at p. 558). See,

also, *Konigsberg* v. *State Bar of California*, 353 U. S. 252, 1 L.ed.2d 810, 77 S.Ct. 722 (1957).

The court distinguished *Garner* v. *Board of Public Works*, 341 U. S. 716, 95 L.ed. 1317, 71 S.Ct. 909 (1951), "where the City was attempting to elicit information necessary to determine the qualifications of its employees" (350 U. S. at p. 588).

After *Slochower* and *Konigsberg*, the distinction became firmly established. The denial or termination of a public contract, employment or license, based solely on the assertion of a constitutional right, was arbitrary. Where the assertion of the privilege had the effect of frustrating a legitimate inquiry of the person's qualifications for such contract, public employment or license, the failure to be candid justified the sanction, without offending the due process clause. *Beilan* v. *Board of Public Education*, 357 U. S. 399, 2 L.ed.2d 1414, 78 S.Ct. 1317 (1958) (public school teacher); *Lerner* v. *Casey*, 357 U. S. 468, 2 L.ed.2d 1423, 78 S.Ct. 1311 (1958) (subway conductor); *Nelson* v. *Los Angeles*, 362 U. S. 1, 4 L.ed.2d 494, 80 S.Ct. 527 (1960) (social workers); and *Kimm* v. *Rosenberg*, 363 U. S. 405, 4 L.ed.2d 1299, 80 S.Ct. 527 (1960) (deported alien). See, especially, concurring opinion of Frankfurter, J., in *Beilan* and *Lerner*, 357 U. S. at p. 410, 2 L.ed.2d at p. 1433.

B. The Privilege Against Self-Incrimination

In 1964 and 1965 this Court decided *Malloy* v. *Hogan*, 378 U. S. 1, 12 L.ed.2d 653, 84 S.Ct. 1489 (1964), and *Griffin* v. *California*, 380 U. S. 609, 14 L.ed.2d 106, 85 S.Ct. 1229 (1965).

In *Malloy*, the Court stated that the privilege against self-incrimination was embodied in the Fourteenth Amendment, and meant "the right to remain silent * * * and to suffer no penalty for such silence" (378 U. S. at p. 8). In *Griffin*, the court noted that a penalty that makes costly the assertion of the privilege cuts down on the privilege (380 U. S. at p. 614).

The rationale of *Malloy* and *Griffin* inevitably led to a review of the prior decisions. The loss of employment, license or of a business opportunity certainly is costly and is a penalty for asserting the privilege. *Missouri* v. *Cummings*, 4 Wall. 277, 320, 18 L.ed. 367 (1867); *In re Grae*, 282 N.Y. 428, 20 N.E.2d 964 (1940).

What had passed muster under a test of arbitrary conduct under the due process clause, might fail when measured by the standards of the privilege against self-incrimination. See *Matter of Gault*, 387 U. S. 1, 18 L.ed.2d 527, 559, 87 S.Ct. — (1967); *Murphy* v. *Waterfront Comm. of N. Y. Harbor*, 378 U. S. 52, 12 L.ed.2d 678, 84 S.Ct. 1594 (1964); *Stevens* v. *Marks*, 383 U. S. 234, 15 L.ed.2d 724, 86 S.Ct. 788 (1966); *Garrity* v. *New Jersey*, 385 U. S. 493, 17 L.ed.2d 562, 87 S.Ct. 616 (1967).

In *Spevack* v. *Klein*, 385 U. S. 511, 17 L.ed.2d 574, 87 S.Ct. 625 (1967), there had been a legitimate inquiry into an attorney's qualifications by a duly authorized committee of the Bar Association. The questions were relevant to that inquiry and dealt with the attorney's fitness. On the other hand, the attorney's only choice was between self-incrimination and loss of license. This Court held that

the privilege against self-incrimination forbade disbarment, even though the attorney's assertion of the privilege tended to frustrate the inquiry, was hardly the candor the committee felt it had a right to expect, and similar disbarment had theretofore been upheld under the due process clause. See *Cohen* v. *Hurley,* 366 U. S. 117, 6 L.ed. 2d 156, 81 S.Ct. 954 (1961). Compare *In re Solovei,* 276 N.Y. 647, 12 N.E.2d 802 (1938).

Three dissenters recognized that the natural effect of the holding was to eliminate the well established distinction between arbitrary and reasonable government action as formulated in *Slochower, Beilan, Lerner* and *Nelson* (385 U. S. at pp. 527-528).

The concurring judge suggested that the different result in *Spevack* might be limited to cases involving non-public employees (385 U. S. at p. 519). The majority explicitly left that question undecided (385 U. S. at p. 516, f.n. 3), although in *Garrity* v. *New Jersey,* 385 U. S. 493, 17 L.ed.2d 562, 87 S.Ct. 616 (1967), they did decide that testimony by a policeman which was coerced by threat of dismissal, like a coerced confession, could not be introduced in evidence.

C. The New York Court of Appeals' Application of *Spevack*

The New York Court of Appeals upheld appellant's disqualification (A39-43, 132-136). On the same day the Court also upheld a disqualification of a policeman, *Gardner* v. *Broderick,* 20 N.Y.2d 277, 282 N.Y.S.2d 487, 229 N.E.2d

184 (1967). The Court noted that its opinion in *Gardner* governed the constitutional question posed by both cases (A42, 135). The Court of Appeals did not view *Spevack* as having established a test different from the traditional due process test in *Nelson* v. *Los Angeles,* and indicated that it did not think this Court would do so in an appropriate case (20 N.Y.2d at pp. 229-30).

Although in *Gardner,* the Court of Appeals stressed its view that a policeman, as an employee of the State, has a greater duty of candor than a non-public employee (20 N.Y.2d at pp. 230-231), it did not explain appellant's disqualification on any different grounds. Not only is appellant not a public employee, but, unlike *Gardner,* appellant was not first given a hearing, and was never questioned by any body or agency authorized to inquire into its fitness. The only investigation was by a Grand Jury, which, by statute, is not authorized to inquire into or render reports on the fitness of non-public employees. Code of Criminal Procedure §§253 and 253-a (App. 25-27); *In re Healy,* 161 Misc. 582, 293 N.Y.S. 584 (Co. Ct. Queens 1937). See, also, *Wood* v. *Hughes,* 9 N.Y.2d 144, 212 N.Y.S.2d 33, 173 N.E.2d 144 (1961); *Application of Grand Jury Report Concerning Its Investigation of Certain Television Quiz Programs,* 19 Misc.2d 682, 193 N.Y.S.2d 553 (Sup. Ct. New York Co. 1959); *Matter of Wilcox,* 153 Misc. 761, 226 N.Y.S. 117 (Sup. Ct. Monroe Co., 1934). With respect to §253-a, see *In re Grand Jury, January, 1967,* 52 Misc. 2d 895, 277 N.Y.S.2d 105, 107 (Sup. Ct. Cortland Co., 1967).

The Public Authorities Law is designed solely to punish private contractors who exercise their privilege against

self-incrimination in the Grand Jury room. Nowhere in the statute, or, for that matter, in any other statute of the State of New York, is there a provision disqualifying individuals or corporations who have actually been found guilty of misconduct. Thus, no matter how serious the misconduct, as long as no one asserts the privilege against self-incrimination, there is no automatic blacklisting. *Matter of Zara Contracting Corp.*, 45 Misc.2d 497, 257 N.Y.S. 2d 479 (Sup. Ct. Alb. Co. 1964), aff'd 23 A.D.2d 718, 257 N.Y.S.2d 118 (3d Dept. 1965); *Caristo Const. Corp.* v. *Rubin*, 10 N.Y.2d 538, 225 N.Y.S.2d 502 (1962). Conversely, no matter how minor or remote the misconduct, there is automatic blacklisting only if the privilege against self-incrimination is asserted. Fitness is immaterial (App. 21-22).

Since Grand Jury proceedings are secret, Code of Criminal Procedure §258 (App. 28), and since not a single question was asked the witness who refused to waive his privilege, appellant's disqualification would probably have been deemed arbitrary on due process grounds, even before *Spevack* (*supra*, pp. 9-10). Since the sole function of the statute is to make the assertion of the privilege costly, *a fortiori*, it is invalid under the test in *Spevack*.

ARGUMENT II

The imposition of a vicarious penalty against a corporation which disavowed the acts of its former president is repugnant to the Due Process Clause of the Fourteenth Amendment.

Appellant was disqualified because a former officer refused to sign a waiver of immunity. The officer in question never actually was in control of the Corporation's activities, although he was the titular head of the Corporation (A 119-120). He was the youthful son of the founder of the business, who was designated President of the Company upon his father's death (A4; 67; 121). This was less than one year after he finished his schooling and entered the business (A119-121).

The Court of Appeals has held that (1) the demand by the corporation for the resignation of the officer in anticipation of his planned refusal to execute a waiver of immunity can be disregarded, and (2) that the procedure for discretionary reinstatement contained in the Public Authorities Law (A42-3; 135-6) satisfies all due process objections.

When dealing with penalties imposed against a corporation, it has always been a cardinal principle that the corporation is responsible only when the acts and actions conducted by its agents were in furtherance of its affairs. *N.Y. Central & H. R. R. Co.* v. *United States,* 212 U. S. 481, 53 L. ed. 613, 29 S. Ct. 304 (1909); *People* v. *Canadian Fur Trappers Corp.,* 248 N.Y. 159, 161 N.E. 451 (1928).

If a corporation is to be disqualified for its refusal to cooperate or be candid in an investigation of its affairs,

then the refusal or lack of candor must be attributable to the corporation as an act of the corporation. In the case at bar, the corporation was candid and cooperated as best it could, and it disavowed, as best it could, the plans of the one person in the corporation who indicated that, for personal reasons, he might not cooperate. That person was dismissed, discharged and separated from his official position in the corporation. If this severance had been a sham and, in fact, the recalcitrant witness continued to control the corporation, his resignation would be disregarded. *Matter of Arglo Painting Corp.* v. *Board of Education,* 47 Misc. 2d 618, 263 N.Y.S.2d 124 (Sup. Ct. Kings Co., 1965). But here, there is no question that appellant is not a "front" for George Campbell, Jr., so that his failure to cooperate cannot conceivably have been deemed an act of the corporation.

To cause the corporation to suffer a penalty of disqualification vicariously in spite of its disavowal before the fact of the so-called contumacious activity, and in spite of the corporation's cooperation and candor, is indiscriminate and arbitrary, and plainly a denial of due process. See *Wieman* v. *Updegraff,* 344 U. S. 183, 97 L. ed. 216, 73 S. Ct. 215 (1952); *Schware* v. *Board of Bar Examiners,* 353 U. S. 232, 1 L. ed. 2d 796, 77 S. Ct. 752 (1957).

The Court of Appeals deemed the procedure set forth in §2603 of the Public Authorities Law (App. 23-24) to satisfy any due process objection which might be raised (A41-42, 135-136).

If §2603 of the Public Authorities Law was limited to a determination of whether George Campbell, Jr.'s resigna-

tion was a sham or whether his refusal to waive immunity was on behalf of the corporation and in furtherance of its affairs, then, perhaps the policy of disqualifying first and holding a hearing later might satisfy due process. But §2603 involves something quite different from a review of the disqualification. Indeed, by its terms it does not even involve a review of the basis for the disqualification. It only deals with whether there has been a change in circumstances after the contumacious behavior, and whether the public interest would be served by reinstatement. Section 2603 was added only after the Legislature realized the disastrous consequences if the State and its agencies were unable to deal with Westinghouse and General Electric, both of whom were subject to automatic disqualification for five years. To cope with this, the Legislature added §2603 (Governor's Message April 21, 1959, McKinney's 1959 Session Laws of New York, pp. 1757-58). The public interest requirement makes the procedure entirely unsuitable for a relatively small company such as appellant.

Moreover, relief under §2603 is discretionary. If appellant is to be punished for lack of candor, then that lack of candor must be attributable to appellant. If lack of candor is not attributable to appellant, then appellant should be reinstated. Discretionary reinstatement for an erroneously disqualified corporation does not supply ample protection.

ARGUMENT III

Section 2601 of the New York Public Authorities Law imposes unconstitutional conditions on those doing business with the State and its agencies.

Section 2601 of the Public Authorities Law requires that all public contracts contain a waiver of the privilege against self-incrimination as a condition of the contract (App. 21-22).

The doctrine of unconstitutional conditions forbids the government from exacting a waiver of important constitutional rights as a condition of its granting a benefit or privilege, even though it might not be required to grant any benefit or privilege at all.

> "The potential erosion of fundamental liberties through the use of this bargaining technique has prompted the development of the doctrine of 'unconstitutional conditions.'" *Unconstitutional Conditions,* 73 Harv. L. Rev. 1595, 1596 (1960).

Accord, Willcox, *Invasions of the First Amendment Through Conditional Public Spending,* 41 Cornell L.Q. 12 (1955); Hale, *Unconstitutional Conditions and Constitutional Rights,* 35 Colum. L. Rev. 321 (1935); Merrill, *Unconstitutional Conditions,* 77 U. of Pa. L. Rev. 879 (1929); Thomas Reed Powell, *The Right to Work for the State,* 16 Colum. L. Rev. 99 (1916).

This Court stated the doctrine in *Frost* v. *Railroad Commission,* 271 U. S. 583, 593-4, 70 L. ed. 1101, 1102-5, 46 S. Ct. 605 (1926):

> "It is not necessary to challenge the proposition that, as a general rule, the state, having power to deny a

> privilege altogether, may grant it upon such conditions as it sees fit to impose. But the power of the state in that respect is not unlimited; and *one of the limitations is that it may not impose conditions which require the relinquishment of constitutional rights.*" (Emphasis added.)

Accord, *Sioux Remedy Co.* v. *Cope,* 235 U. S. 197, 59 L. ed. 193, 35 S. Ct. 57 (1914) (statute which forbade use of state courts to foreign corporations unless they subjected themselves to the general jurisdiction of the state by the appointment of a resident agent held to violate the Commerce Clause); *Western Union Tel. Co.* v. *Kansas,* 216 U. S. 1, 54 L. ed. 355, 30 S. Ct. 190 (1909) (excessive tax imposed as a condition of doing business by foreign corporation held to violate the due process and commerce clauses); *Terral* v. *Burke Const. Co.,* 257 U. S. 529, 66 L. ed. 352, 42 S. Ct. 93 (1922) (doing business conditioned on agreement not to remove cases to Federal Courts held to violate Article 3).

The government may not act with the same freedom as a private party. Thus, when the government puts conditions in its contracts which are regulatory, they are tested by the same rules as any other government regulation. *Frost* v. *Railroad Comm.,* *supra*; *Home Insurance Co.* v. *Morse,* 87 U. S. 445, 22 L. ed. 365 (1874).

The privilege against self-incrimination is a right "of constitutional stature whose exercise a state may not condition by the exaction of a price." *Garrity* v. *New Jersey,* 385 U. S. 493, 500, 17 L. ed. 2d 562, 567, 87 S. Ct. 616 (1967).

Since the statute here purports to allow the "buying up" of constitutional rights, it and the clause of the contract executed thereunder are invalid.

Conclusion

For the reasons set forth above, appellant's disqualification should be reversed.

Respectfully submitted,

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New York State Public Authorities Law

"2601 *Ground for Cancellation of Contract by Public Authority*

A clause shall be inserted in all specifications or contracts hereafter made or awarded by any public authority or by any official of any public authority created by the state or any political subdivision, for work or services performed or goods sold or to be sold, to provide that upon the refusal by a person, when called before a grand jury to testify concerning any transaction or contract had with the state, any political subdivision thereof, a public authority or with any public department, agency or official of the state or of any political subdivision thereof or of a public authority, to sign a waiver of immunity against subsequent criminal prosecution or to answer any relevant question concerning such transaction or contract.

(a) Such person, and any firm, partnership or corporation of which he is a member, partner, director or officer shall be disqualified from thereafter selling to or submitting bids to or receiving awards from or entering into any contracts with any public authority or official thereof, for goods, work or services, for a period of five years after such refusal, and to provide also that

(b) any and all contracts made with any public authority of official thereof, since the effective date of this law, by such person and by any firm, partnership or corporation of which he is a member, partner, director or officer

may be cancelled or terminated by the public authority without incurring any penalty or damages on account of such cancellation or termination, but any monies owing by the public authority for goods delivered or work done prior to the cancellation or termination shall be paid."

"2602 *Disqualification to Contract with Public Authority*

Any person who, when called before a grand jury to testify concerning any transaction or contract had with the state, any political subdivision thereof, a public authority or with a public department, agency or official of the state or of any political subdivision thereof or of a public authority, refuses to sign a waiver of immunity against subsequent criminal prosecution or to answer any relevant question concerning such transaction or contract, and any firm, partnership or corporation, of which he is a member, partner, director or officer shall be disqualified from thereafter selling to or submitting bids to or receiving awards from or entering into any contracts with any public authority or any official of any public authority created by the state or any political subdivision, for goods, work or services, for a period of five years after such refusal or until a disqualification shall be removed pursuant to the provisions of section twenty-six hundred three of this title.

It shall be the duty of the officer conducting the investigation before the grand jury before which the refusal occurs to send notice of such refusal, together with the names of any firm, partnership or corporation of which the person so refusing is known to be a member, partner, officer or director, to the superintendent of public works of the state

of New York and the appropriate departments, agencies and officials of the state, political subdivisions thereof or public authorities with whom the persons so refusing and any firm, partnership or corporation of which he is a member, partner, director or officer, is known to have a contract."

"2603 *Removal of Disqualification of Public Contractors by Petition*

1. Any firm, partnership or corporation which has become subject to the cancellation or termination of a contract or disqualification to contract on account of the refusal of a member, partner, director or officer thereof to waive immunity when called to testify, as provided in sections twenty-six hundred one and twenty-six hundred two of this title, may, upon ten days' notice to the attorney general and to the officer who conducted the investigation before the grand jury in which the refusal occurred, commence a special proceeding at a special term of the supreme court held within the judicial district in which the refusal occurred for a judgment discontinuing the disqualification. Such application shall be in the form of a petition setting forth grounds, including that the cooperation by petitioner with the grand jury at the time of the refusal was such, and the amount and degree of control and financial interest, if any, in the petitioning firm, partnership or corporation by the member, partner, officer or director who refused to waive immunity is such that it will not be in the public interest to cancel or terminate petitioner's contracts or to continue the disqualification, as provided in sections twenty-six hundred one and twenty-six hundred two of this title.

A copy of the petition and accompanying papers shall be served with the notices to be given pursuant to this subdivision.

2. Upon the filing of such petition the court may stay as to petitioner, pending a decision upon the petition, the cancellation or termination of any contracts resulting from such refusal upon such terms as to notice or otherwise as may be just.

3. At least two days prior to the return day, the officer who conducted the investigation before the grand jury and the attorney general may file answers to the petition or apply for judgment dismissing the petition as a matter of law. On or before the return day the petitioner may file a reply to the answer.

4. Upon the return day the court may, upon the petition and answer and other papers filed, forthwith render such judgment as the case requires, or if a triable issue of fact is duly raised, it shall forthwith be tried before a court sitting without a jury or before a referee. The provisions of statute or rule governing references in an action shall apply to a reference under this subdivision.

5. The court shall render judgment dismissing the petition on the merits or discontinuing the disqualification upon the ground that the public interest would be served by its discontinuance, and granting such other relief as to the cancellation or termination of contracts as may be appropriate, but without costs to petitioner."

New York State Code of Criminal Procedure

"§253. *Grand jury must inquire as to persons imprisoned on criminal charges and not indicted, and the misconduct of public officers*

The grand jury must inquire,

1. Into the case of every person imprisoned in the jail of the county, on a criminal charge, and not indicted; and

2. Into the wilful and corrupt misconduct in office, of public officers of every description, in the county.

3. The grand jury may inquire into the condition and management of the public prisons in the county."

"§253-a. *Grand jury reports*

1. The grand jury, upon concurrence of twelve or more of its members, may submit to the court for which it was impanelled, a report:

(a) concerning non-criminal misconduct, nonfeasance or neglect in office by a public officer or employee as the basis for a recommendation of removal or disciplinary action; or

(b) stating that after investigation of a public officer or employee it finds no misconduct, nonfeasance or neglect in office by him, provided that such public officer or employee has requested the submission of such report; or

(c) proposing recommendations for legislative, executive or administrative action in the public interest based upon stated findings.

2. The court to which such report is submitted shall examine it and the minutes of the grand jury and, except as otherwise provided in subdivision four of this section, shall make an order accepting and filing such report as a public record only if the court is satisfied that it complies with the provisions of subdivision one of this section and that:

(a) the report is based upon facts revealed in the course of an investigation authorized by section two hundred forty-five or two hundred fifty-three of this code and is supported by the preponderance of the credible and legally admissible evidence; and

(b) when the report is submitted pursuant to paragraph (a) of subdivision one of this section, that each person named therein was afforded an opportunity to testify before the grand jury prior to the filing of such report, and when the report is submitted pursuant to paragraph (b) or (c) of subdivision one of this section, it is not critical of an identified or identifiable person.

3. (a) An order accepting a report pursuant to paragraph (a) of subdivision one of this section and the report shall be sealed by the court and shall not be filed as a public record, subject to subpoena or otherwise made public (i) until at least thirty-one days after a copy of the order and report are served upon each public officer or employee named therein or (ii) if an appeal is taken pursuant to section five hundred seventeen-a of this code, until the affirmance of the order accepting the report, reversal of the order sealing the report or dismissal of the appeal of the named public officer or employee by the appellate division of the supreme court, whichever occurs later.

(b) Such public officer or employee may file with the clerk an answer to such a report, not later than twenty days after service of the order and report upon him. Such an answer shall plainly and concisely state the facts and law constituting the defense of the public officer or employee to the charges in said report, and, except, those parts thereof which the court may determine to be scandalously or prejudiciously and unnecessarily inserted therein, shall become an appendix to the report.

(c) Upon the expiration of the time set forth in paragraph (a) of this subdivision, the district attorney shall deliver a true copy of such report, and the appendix if any, for appropriate action, to each public officer or body having removal or disciplinary authority over each public officer or employee named therein.

4. Upon the submission of a report pursuant to subdivision one of this section, if the court finds that the filing of such report as a public record may prejudice fair consideration of a pending criminal matter, it shall order such report sealed and such report shall not be subject to subpoena or public inspection during the pendency of such criminal matter, except upon order of the court.

5. Whenever the court to which a report is submitted pursuant to paragraph (a) of subdivision one of this section is not satisfied that the report complies with the provisions of subdivision two of this section, it may direct that additional testimony be taken before the same grand jury, or it shall make an order sealing such report and it shall not be filed as a public record, subject to subpoena or otherwise made public."

"§258. *Secrets of the grand jury to be kept*

Every member of the grand jury must keep secret whatever he himself, or any other grand juror, may have said, or in what manner he, or any other grand juror, may have voted, on a matter before them."

New York State Penal Law

"§2447. *Witnesses' immunity*

1. In any investigation or proceeding where, by express provision of statute, a competent authority is authorized to confer immunity, if a person refuses to answer a question or produce evidence of any other kind on the ground that he may be incriminated thereby, and, notwithstanding such refusal, an order is made by such competent authority that such person answer the question or produce the evidence, such person shall comply with the order. If such person complies with the order, and if, but for this section, he would have been privileged to withhold the answer given or the evidence produced by him, then immunity shall be conferred upon him, as provided for herein.

2. "Immunity" as used in this section means that such person shall not be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which, in accordance with the order by competent authority, he gave answer or produced evidence, and that no such answer given or evidence produced shall be received against him upon any criminal proceeding. But he may nevertheless be prosecuted or subjected to penalty or forfeiture for any perjury or contempt committed in answering, or failing to answer, or in pro-

ducing or failing to produce evidence, in accordance with the order, and any such answer given or evidence produced shall be admissible against him upon any criminal proceeding concerning such perjury or contempt.

3. "Competent authority" as used in this section means:

(a) The court or magistrate before whom a person is called to answer questions or produce evidence in a criminal proceeding other than a proceeding before a grand jury, when such court or magistrate is expressly requested by the prosecuting attorney to order such person to give answer or produce evidence; or

(b) The court before whom a person is called to answer questions or produce evidence in a civil proceeding to which the state or a political subdivision thereof, or a department or agency of the state or of such political subdivision, or an officer of any of them in his official capacity, is a party, when such court is expressly requested by the attorney-general of the state of New York to order such person to give answer or produce evidence; or

(c) The grand jury before which a person is called to answer questions or produce evidence, when such grand jury is expressly requested by the prosecuting attorney to order such person to give answer or produce evidence; or

(d) A legislative committee or temporary state commission before which a person is called to answer questions or produce evidence in an inquiry or investigation, upon twenty-four hours prior written notice to the attorney-gen-

eral of the state of New York and to the appropriate district attorney having an official interest therein; provided that a majority of the full membership of such committee or commission concur therein; or

(e) The head of a state department or other state agency, a commissioner, deputy or other officer before whom a person is called to answer questions in an inquiry or investigation, upon twenty-four hours prior written notice to the attorney-general of the state of New York and to the appropriate district attorney having an official interest therein.

Provided, however, that no such authority shall be deemed a competent authority within the meaning of this section unless expressly authorized by statute to confer immunity.

4. Immunity shall not be conferred upon any person except in accordance with the provisions of this section.

5. If, after compliance with the provisions of this section, or any other similar provision of law, a person is ordered to answer a question or produce evidence of any other kind and complies with such order, and it is thereafter determined that the appropriate district attorney having an official interest therein was not notified, such failure or neglect shall not deprive such person of any immunity otherwise properly conferred upon him."

United States Constitution

"AMENDMENT XIV.—*Citizenship; Privileges and Immunities; Due Process; Equal Protection; Apportionment of Representation; Disqualification of Officers; Public Debt; Enforcement*

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 673

GEORGE CAMPBELL PAINTING CORP.,
Appellant,

against

WILLIAM REID, FRANCIS V. MADIGAN, IRA S. ROBBINS, Members of the New York City Housing Authority, and THE NEW YORK CITY HOUSING AUTHORITY,
Appellees.

GEORGE CAMPBELL PAINTING CORP.,
Appellant,

against

WILLIAM REID, FRANCIS V. MADIGAN, IRA S. ROBBINS, Members of the New York City Housing Authority, and THE NEW YORK CITY HOUSING AUTHORITY,
Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF FOR APPELLEE ATTORNEY GENERAL OF THE STATE OF NEW YORK

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 673

GEORGE CAMPBELL PAINTING CORP.,
Appellant,

against

WILLIAM REID, FRANCIS V. MADIGAN, IRA S. ROBBINS, Members of the New York City Housing Authority, and THE NEW YORK CITY HOUSING AUTHORITY,
Appellees.

GEORGE CAMPBELL PAINTING CORP.,
Appellant,

against

WILLIAM REID, FRANCIS V. MADIGAN, IRA S. ROBBINS, Members of the New York City Housing Authority, and THE NEW YORK CITY HOUSING AUTHORITY,
Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF FOR APPELLEE ATTORNEY GENERAL OF THE STATE OF NEW YORK

Opinions Below

The opinion of the New York Court of Appeals in the consolidated cases is reported at 20 N. Y. 2d 370, 229 N. E.

2d 602, 283 N.Y.S. 2d 31, and is set forth in the Appendix (A. 42-43; 134-135).* The order of the Appellate Division, First Department in the proceeding pursuant to Article 78 of the New York Civil Practice Law and Rules is reported at 26 A. D. 2d 992, 275 N.Y.S. 2d 363, and is set forth at page 38 of the Appendix. The opinion of the Appellate Division, First Department, in the plenary action is reported at 26 App. Div. 2d 912, 275 N.Y.S. 2d 365, and is set forth at pages 128-129 of the Appendix. The opinion of the Supreme Court in the Article 78 proceeding is reported at 48 Misc. 2d 544, 265 N.Y.S. 2d 304 (A. 32-34). The opinion of the Supreme Court in the plenary action is not officially reported (A. 124-125). The order of the Appellate Division, First Department, granting leave to the Attorney General to intervene pursuant to N. Y. Executive Law § 71, is reported at 26 A. D. 2d 778.

Jurisdiction

The order of the New York Court of Appeals was entered on July 7, 1967 (A. 39-41; 131-133). The notices of appeal were filed on September 18, 1967 (A. 44-46; 136-138). The jurisdictional statement was filed on October 2, 1967. Probable jurisdiction was noted on January 29, 1968 (A. 47; 139).

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(2).

Constitutional and Statutory Provisions Involved

United States Constitution, amends. V, XIV; N. Y. Public Authorities Law §§ 2601-3 (Appellant's Appendix pp. 21-24).

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* Numbers in parentheses preceded by the letter "A" refer to pages in the Appendix.

Questions Presented

1. Is N. Y. Public Authorities Law § 2601 unconstitutional insofar as it provides that, where an officer of a corporation refuses to waive immunity before a grand jury with respect to public contracts into which it has entered, the corporation of which he is an officer may not continue to hold existing contracts or secure new ones for a period of five years?

2. May appellant corporation avoid the conditions of the contracts it entered into with appellee?

3. Is the decision of the Court of Appeals final with respect to appellant's claim that it may not contract with the State of New York?

4. May appellant corporation assert for itself the personal self-incrimination and due process rights of George Campbell, Jr.?

Statement of the Case

During 1964, the appellant, a closely held family corporation, entered into three painting contracts with the appellee New York City Housing Authority. Each contract contained a standard paragraph 38 in accordance with Public Authorities Law § 2601, providing that, where a person refuses to sign a waiver of immunity when requested to appear before a grand jury to testify concerning public contracts, such person and any firm, partnership or corporation of which he is a member, partner, director or officer shall be disqualified for five years from bidding on public contracts and any existing contracts shall be terminated (A. 3-4; 51; 79-80). All three contracts were executed on behalf of the appellant by its president, George Campbell, Jr., who was also a director and stockholder of the corporation (A. 79).

Early in 1965, appellant's officers, including its president, became aware that the District Attorney of New York County was conducting an investigation before a Grand Jury to determine whether the crime of bid rigging on public contracts, including those entered into by appellant, had occurred in New York County (A. 51-52; 85). On March 26, 1965, George Campbell, Jr. purported to resign as president and director of the appellant corporation and to turn over his shares of stock (A. 52, 56, 67). On the same date he became employed as an "estimator" by the appellant corporation (A. 5, 67).

The resignation was specifically arranged by the corporation to circumvent the express provisions of the contract containing the statutory language. The papers in the plenary action alleged that Campbell became aware of the Grand Jury investigation of appellant corporation on March 26, 1965, and was advised by counsel that he "could expect to be subpoenaed and requested to waive statutory immunity" (A. 51-52).

The officers of appellant corporation were advised by the corporation's counsel "of the penalty that would result if any of us refused to waive immunity". Strangely, of all the officers and directors, only Campbell, "then only twenty-four years of age, and having the fewest years of service with the company, deemed it advisable to refuse to waive immunity", and he was, therefore, requested to offer and did offer his resignation (A. 52).

On Friday, April 9, 1965, after Mr. Campbell allegedly had already been employed by appellant in his new capacity, the Board of Directors of appellant allegedly met and purported to accept his resignation (A. 52, 55). On April 13, Mr. Campbell was served in the office of the corporation's lawyer with the subpoena (A. 52). On April 14, the Grand Jury met. In accordance with his corporate arrangement, he refused to sign the statutory waiver of

immunity and, consequently, was not asked to testify (A. 52-53).

By letter dated April 16, 1965, the New York County District Attorney informed the Housing Authority that Campbell had refused to sign such a waiver of immunity. On April 21, 1965, the Authority advised appellant that, pursuant to § 38 of the general conditions of the contracts, the contracts were cancelled and terminated effective immediately and that Mr. Campbell and the corporation were disqualified from doing business with the Authority for the five years (A. 16-17; 57-58).

Appellant commenced an action by way of an order to show cause for an order *pendente lite* enjoining the Housing Authority from barring or disqualifying appellant from future bidding and directing restoration of its name to the qualified bidder list (A. 49). Appellee Housing Authority cross-moved to dismiss and the motion was granted only to the extent of staying the action pending determination of appellant's appeal from an order of the Supreme Court, New York County granting appellees' motion to dismiss the petition in a proceeding pursuant to Article 78 of the N. Y. Civil Practice Law and Rules (A. 122-123). The Article 78 proceeding was for an order annulling the Housing Authority's determination barring and disqualifying appellant from public contracts for five years. The motion was granted without prejudice to the commencement of a plenary action (A. 32-34).

On appeal to the Appellate Division, First Department, the order in the Article 78 proceeding was affirmed without opinion (A. 37-38). On the same date, on cross appeals, the order in the plenary action was modified in an opinion which stated in pertinent part that:

> "The complaint is insufficient because plaintiff is subject to the contractual agreements it made and because on the present allegations plaintiff does not establish a case for equitable relief." (A. 130)

On consolidated appeals, the New York Court of Appeals held that Public Authorities Law § 2601 is constitutional citing *Matter of Gardner* v. *Broderick*, 20 N. Y. 2d 227, 229 N. E. 2d 184, probable jurisdiction noted No. 635, Oct. T. 1967, decided the same day (A. 42, 134). The Court held the disqualification to be valid. The Court further held that the fact that the appellant's officer resigned prior to his appearance before the Grand Jury was not controlling where the resignation was virtually contemporaneous with his refusal to sign the waiver of immunity and where it was obvious that the sole purpose of the resignation was to avoid the statutory disqualification. The Court held that while there might be times when the statute might penalize a corporation which "had severed its connection with the recalcitrant officer and which has otherwise been cooperative", the Legislature had provided a procedure for the removal of such disqualification (Public Authorities Law § 2603). The Court concluded that "the appellant's exclusive remedy is the procedure outlined in that statute" (A. 43, 135).

Summary of Argument

N. Y. Public Authorities Law § 2601 provides that each public contract provide for a five-year disqualification from such contracts and the cancellation of existing contracts of any corporation whose officers refuse to sign a waiver of immunity when called to testify before a grand jury with respect to those contracts. The statute was passed to further the express State purpose of insuring that its contracts go to "the lowest responsible bidder." The aim of the statute is to require candor of those who would do business with the State with respect to that business and thus to protect the public fisc. The requirement of candor is thus reasonably related to a valid State purpose.

The decisions of this Court with respect to the Fifth Amendment privilege against self-incrimination do not

alter the validity of the requirement of candor. The statute is not a penalty for invoking the privilege but a valid requirement in and of itself. After *Garrity* v. *New Jersey*, 385 U. S. 493, the privilege is completely insulated since no testimony obtained under compulsion from the individual can be used in criminal proceedings against him. *Spevack* v. *Klein*, 385 U. S. 511, holding that the privilege is available to an attorney, simply represents a situation where its invocation could not be the basis for disbarment where the information might not be required and where the attorney did not stand in a special relationship to the State. Moreover, the result, stripping the attorney of his license and livelihood, did not seem required by the refusal to divulge. Debarment from public contracting is an appropriate response to a refusal to divulge contract information.

Since the relationship between the State purpose and the statutory requirement is reasonable, the requirement may be included in a State contract. In any event, appellant, having accepted the benefit of the State contract, cannot be heard to complain that one of its provisions is unconstitutional. The time to complain was before the contracts were signed. The right to complain has been waived by the contract.

Appellant's claim that, whatever the validity of the disclosure requirement, it cannot be disqualified because the offending officer, George Campbell, Jr., is no longer in a position of control in the corporation, has not been finally adjudicated by the State courts. The Court of Appeals held that the "exclusive remedy" to test this claim is a proceeding pursuant to N. Y. Public Authorities Law, § 2603. The determination of the Court of Appeals is, thus, not a "final" adjudication within the meaning of 28 U.S.C. § 1257. Moreover, the determination of the Court of Appeals rests on an independent and adequate State ground.

In seeking to circumvent the requirement of candor, appellant bases its primary reliance on the Fifth Amend-

ment privilege against self-incrimination of George Campbell, Jr. That privilege not only was not violated (Point I, *infra*), but it is personal to Mr. Campbell. Appellant has no such privilege of its own and cannot invoke his. This is not a case where one person's rights can be vindicated only if another asserts them. Here, the corporation insists that the sanction against it *is* the violation of the rights of another. In fact, no such violation has occurred.

POINT I

The disqualification provisions of New York Public Authorities Law § 2601 are reasonably related to a valid State purpose and are constitutional. In any event, appellant may not now challenge the conditions of the contracts into which it entered.

This Court has established that inquiry into the validity of legislation, "where the legislative judgment is drawn in question, must be restricted to the issue whether any state of facts either known or which could reasonably be assured afford support for it." *United States* v. *Carolene Products Co.*, 304 U. S. 144, 154. See also, *Goldblatt* v. *Town of Hempstead*, 369 U. S. 590, 596; *Matter of Van Berkel* v. *Power*, 16 N. Y. 2d 37, 40 (1965).

It is undeniable that the State has the power and the duty to protect the welfare of its people (*City of El Paso* v. *Simmons*, 379 U. S. 497, 508-509; *East New York Savings Bank* v. *Hahn*, 326 U. S. 230, 232-33), and that corrupt practices in the obtaining and execution of public contracts are inimical to that welfare. The State policy with respect to the letting of public contracts is typified in N. Y. State Finance Law § 174, providing, *inter alia*, that such contracts:

> "shall be let to the lowest responsible bidder, as will best promote the public interest, taking into consideration the reliability of the bidder, the qualities of

> the articles proposed to be supplied, their conformity with the specifications, the purposes for which required and the terms of delivery; provided, however, that no such contract shall be let to a bidder, other than the lowest responsible bidder without the written approval of the comptroller . . . . Each bid with the name of the bidder shall be entered of record and each record, with the successful bid indicated, shall be open to public inspection."

To the same effect are, *e.g.*, N. Y. General Municipal Law § 103; N. Y. Highway Law, § 38; N. Y. Education Law, § 2556(10). See also N. Y. Public Housing Law, § 151. It is of the highest importance in New York that there be no collusive bidding or bid rigging for public contracts. Thus, every public contract requires proper assurance to that effect as one of its conditions. See e.g., N. Y. General Municipal Law § 103-d; N. Y. Public Authorities Law, § 2604; N. Y. Public Housing Law, § 151; N. Y. State Finance Law, § 139-d. Indeed, collusive bidding is a crime. N. Y. General Municipal Law, § 103-e.* Of course, other aspects of contractor misconduct may also be crimes or sufficient basis to breach the contract. The federal requirement is similar. A "certification of independent price determination" clause must be set out in almost all bids for government contracts. 41 C.F.R. § 1-1.317.

The object of the New York bidding laws is "the benefit and protection of the public". *Matter of Zara Contracting Co. Inc.* v. *Cohen*, 45 Misc. 2d 497, 499, 257 N.Y.S. 2d 479 (Sup. Ct. Albany Co. 1964), *aff'd.* 23 A. D. 2d 718, 257 N.Y.S. 2d 118 (3rd Dept.), *lv. to app. den.* 16 N. Y. 2d 482 (1965). A determination as to the lowest responsible bidder, for example, requires a determination of "integrity and moral worth". *Matter of Caristo Constr. Corp.*

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* George Campbell, Jr. himself has pleaded guilty to this crime with respect to the contracts in question. Sentencing is presently set for April 16, 1968.

v. *Rubin,* 30 Misc. 2d 185, 198, 221 N.Y.S. 2d 956, 969 (Sup. Ct. Kings Co.), *aff'd.* 15 A. D. 2d 561, 222 N.Y.S. 2d 998 (2d Dept. 1961), *aff'd.* 10 N. Y. 2d 539, 225 N.Y.S. 2d 502; *Matter of Arglo Painting Corp.* v. *Board of Education,* 47 Misc. 2d 618, 620-21, 263 N.Y.S. 2d 124 (Sup. Ct. Kings Co. 1965); *Picone* v. *City of New York,* 176 Misc. 967, 29 N.Y.S. 2d 539 (Sup. Ct. N.Y. Co. 1941); *Matter of Limitone* v. *Galgano,* 21 Misc. 2d 376, 189 N.Y.S. 2d 738 (Sup. Ct. Westch. Co. 1959). Almost all federal government contracts must contain a provision that the contractor agrees to let the Comptroller General and his representatives examine all records directly pertaining to and involving transactions relating to the prime contract or subcontract for a period of three years from final payment. 10 U.S.C. § 2313(b); 41 U.S.C. § 254(c). And the federal contracting officer must be able to assess the responsibility of the contractor. 41 C.F.R. § 1-1.310-1-11; 1-1.310-5(4). See *United Public Workers* v. *Mitchell,* 330 U. S. 75. See also 2 McBride & Wachtell, Government Contracts, p. 10-73.

In order to determine whether or not bidders and contractors are responsible, the State must be able to insure candor on the part of public contractors and to protect the public from persons or corporations which refuse to be candid in their public dealings. This was precisely the legislative purpose in enacting Public Authorities Law, § 2601 and similar statutes.* In recommending the legislation, the New York State Attorney General said:

> "At the present time under Article I, Section 6 of the Constitution and Public Officers Law, Section 3-a, public officials who refuse to waive immunity are subject to removal from office and disqualified from holding any other public office for five years from the

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* N. Y. General Municipal Law § 103-a, b; N. Y. State Finance Law § 139-a, b; N. Y. Public Housing Law, § 151; N. Y. Public Authorities Law, § 2602.

time of refusal. There is every reason why the same disqualification should apply to people doing business with and profiting by business dealings with government.

The Extraordinary Grand Jury conducting an investigation in Ulster County, on January 28, 1959 handed up a presentment pointing out that its inquiry had been blocked by the refusal of persons who had been selling merchandise and equipment to the county to give testimony about their dealings with public officials. It recommended legislation to meet that problem. This bill is such legislation." *Memorandum of the Attorney General,* NEW YORK STATE LEGISLATIVE ANNUAL (1959), p. 148.

In approving the new legislation, Governor Rockefeller pointed out:

"Unlike a private person who may contract with whom he wishes, a public agency usually lets contracts by public auction and is required to accept the lowest bid. For that reason, it would seem appropriate to disqualify the bids of persons who are unwilling to disclose to a grand jury facts relating to some prior contract with the public. Likewise, it would seem appropriate that public contracts should provide that the benefits accruing under them be available only so long as the beneficiary is willing, when required by a grand jury, to disclose any information he may have as to a public contract." *Memorandum of the Governor,* NEW YORK STATE LEGISLATIVE ANNUAL (1959), p. 431.

See *United States* v. *Acme Process Co.,* 385 U. S. 138, 144.

There is, thus, a strong state policy and interest in honest contracting. It is a *sine qua non* of overseeing con-

tractors that they be required to supply appropriate officials with continuing information with respect to their contracts. "[I]t would be difficult to gainsay the reasonableness of the state's effort to impose legislatively upon those with whom it does business a continuing duty of candor and disclosure concerning their transactions with the state". *Holland* v. *Hogan*, 272 F. Supp. 855, 869 (S.D.N.Y. 1967) (3 Judge Court), appeal pending Oct. T. 1967, No. 653. See also *United States ex rel. Laino* v. *Warden*, 246 F. Supp. 72, 93-94 (S.D.N.Y. 1965), *affd.* 355 F. 2d 208 (2d Cir. 1966).

This Court has consistently upheld the right of a State to exact candor of its public employees. *Nelson* v. *Los Angeles*, 362 U. S. 1; *Beilan* v. *Board of Public Education*, 357 U. S. 399; *Lerner* v. *Casey*, 357 U. S. 468, *reh. den.* 358 U. S. 858; *Slochower* v. *Board of Higher Education*, 350 U. S. 551; *Garner* v. *Board of Public Works*, 341 U. S. 716. This duty of candor derives from the nature of the relationship between public employee and employer and the nature of the relationship between the information sought and the employment. The public contractor stands at least in no less special a relationship to the state than does the public employee (*United States ex rel. Laino* v. *Warden, supra*, at 94), and the nature of the information sought must by law relate to the public contracts.

Appellant appears to concede the closeness of the relationship between its position as a contractor and the nature of the information required, but adopts instead the extraordinary position that the Fifth Amendment decisions of this Court, have obviated the distinction between reasonable and unreasonable disclosure requirements and have, in effect, insulated it from any such requirements at all (Br. for appellant, pp. 9-14). Even if appellant could raise a Fifth Amendment claim, which it cannot (Point III, *infra*), the result it seeks, if accomplished, would be folly. In fact, it is unwarranted by any decision of this

Court or by any cogent rationale. In protecting the privilege against self-incrimination available to public employees (and free speech, see e.g., *Keyishian* v. *Board of Regents,* 385 U. S. 589), the general concern has been that no one be compelled to give testimony which would subject him to criminal penalty. None of those cases involved the government's right to information. The nub of the holding of those cases is that the government does not have a right to compel from the individual information which can be used to convict him of a crime. It does have a right to information relating to government employment or contracts.

Long before the privilege against self-incrimination was held applicable to the States, this Court recognized that mere invocation of the privilege should not lead in every instance to consequences as a penalty for invoking the privilege. *Slochower* v. *Board of Higher Education, supra.* There, the Court held that Prof. Slochower, under the particular facts of that case, should have the opportunity to explain his refusal to testify before a congressional committee and to demonstrate that it bore no relation to his teaching capacity (*id.* at 556, 558).

Obviously, New York Public Authorities Law, § 2601, is not a penalty for mere invocation of the privilege but a protection for the state against contractors who refuse to be candid. *United States ex rel. Laino* v. *Warden, supra* at 94. See *Copper Plumbing & Heating Co.* v. *Campbell,* 290 F. 2d 368 (D. C. Cir. 1961); 41 C.F.R. § 1-1.601. The refusal to waive immunity is not taken as a confession of guilt of any wrongdoing. It is the refusal to provide required information itself which operates to disqualify where the information may be required and where individual criminal consequences may not result.

Thus, this Court has held in *Spevack* v. *Klein,* 385 U. S. 511, relied upon by appellant, that an attorney admitted to State practice could invoke the privilege against self-

incrimination in a disbarment inquiry. It did not hold that the might not be required to produce certain information relative to his professional integrity. But there, the attorney-licensee stood in no special relationship to the State (concurring opinion at 519-20) and had not had an opportunity to demonstrate whether or not it was within the power of the investigating body to demand the information (*id.* at 518-19) and most significantly the consequences of disbarment are catastrophic for an attorney (*id.* at 516).

In dealing with public contractors, this Court long ago held, in *McMullen* v. *Hoffman*, 174 U. S. 639, 651, that public contracts cannot be surrounded with too many precautions for the purpose of obtaining perfectly fair and bona fide bids. The consequences of disqualification of a contractor from public bidding are minimal as compared to the dismissal of a career public employee or the disbarment of an attorney or even the revocation of an ordinary public license. The disqualification of the contractor does not affect his ability to engage in his business. Thus, the appellant by the disqualification was not barred thereby from continuing to engage in the painting business in the City of New York.* Thus, even more than in the case of a public employee, or an attorney whose professional career can be terminated for failure to furnish relevant information or that of any other public licensee, the requirement invoked here was most clearly a reasonable and fair condition to which the public contractor agreed in entering into the public contract. Debarment from public

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* It must not be overlooked that the painting contracts concerned in the present case involved subsidized public housing operated by a governmental authority in a proprietary capacity. Any failure of the bid system because of collusion or otherwise to produce the lowest responsible bid would be reflected in excessive rents to tenants having already meagre earnings.

contracting is a proper exercise of government power to regulate contractor responsibility. See *United States* v. *Acme Process Co.*, 385 U. S. 138.

Furthermore, even were the individual privilege against self-incrimination involved here, this Court, far from removing disclosure requirements on the part of public employees and contractors, has now facilitated the acquisition of information and provided for the protection of both the individual and the State. *Garrity* v. *New Jersey*, 385 U. S. 493. By holding that any information elicited from such an individual may not be used against him in criminal proceedings, the Court has removed any bar to requiring that information for a valid state purpose not penal or quasi-criminal in nature.

After *Garrity*, even if a waiver of immunity were signed, any information elicited could not be used to prosecute for a substantive crime. *People* v. *Goldman*, 21 N. Y. 2d 152, 234 N. E. 2d 194 (1967). Hence, the only basis for refusal to sign would be to protect the corporation from the effect of any testimony, not the individual. It is not necessary, in protecting the privilege against self-incrimination also to place the State in the position of being unable to continue the duty of candor and to be required to pay from the public treasury contractors who decline to discuss their contracts. The contractor is not required to sacrifice a constitutional right to protect his contracts. Certainly he cannot be heard to say that if he tells the truth about those contracts he no longer will be entitled to public moneys. See *Piemonte* v. *United States*, 367 U. S. 556, 559 n. 2; *Ullmann* v. *United States*, 350 U. S. 422, 431; *Brown* v. *Walker*, 161 U. S. 591, 600.

Because the requirement involved here is reasonably related to the end it is designed to achieve and because that end is valid, its inclusion in a contract is not unconstitu-

tional. See e.g., *Atkin* v. *Kansas*, 191 U. S. 207; Walsh-Healey Act (41 U.S.C. §§ 35-45). Davis-Bacon Act (40 U.S.C. §§ 276a-c); Service Contract Labor Standards Act (41 U.S.C. §§ 351-57); 41 C.F.R. § 1-12.803, *cf. Frost Trucking Co.* v. *R. R. Comm.*, 271 U. S. 583, in which the regulation was held not reasonably related to the announced statutory purpose. Certainly the State may require of a contractor a condition reasonably related to the advancement of the public welfare. *Perkins* v. *Lukens Steel Co.*, 310 U. S. 113; *People* v. *Crane*, 214 N. Y. 154, 168, *aff'd. sub nom. Crane* v. *New York*, 239 U. S. 197.

In any event, appellant should be held bound by the contracts it signed. This was the view enunciated by the Appellate Division of the Supreme Court, First Department (A. 130). It was a condition of the contracts, a condition of which all of appellant's officers and directors obviously were well aware, that, upon the refusal of any one of them to testify before a Grand Jury concerning the contracts they were obtaining, disqualification and cancellation would result. The corporation fully and freely, in order to obtain an economic advantage over its competitors, who were public bidders, thereby agreed to procure its officers' waiver of any Fifth Amendment objection to the continuing availability to the state or its investigating agency of information relative to the contracts. Appellant, thus having agreed to the contracts subject to this condition to obtain the benefits thereof, cannot be heard to complain now that it has breached such condition in the contract. *Fahey* v. *Malonee*, 332 U. S. 245, 255-256; *Ashwander* v. *Tennessee Valley Authority*, 297 U. S. 288, 348 (concuring opinion); *Booth Fisheries* v. *Industrial Comm.*, 271 U. S. 208; *Buck* v. *Kuykendall*, 267 U. S. 307; *Campbell* v. *City of New York*, 244 N. Y. 317, 155 N. E. 628. See *Dennis* v. *United States*, 384 U. S. 855, 865. Whether or not the State could have required the waiver of a constitutional right (*Stevens* v. *Marks*, 383 U. S. 234,

243 and see *Regan* v. *New York,* 349 U. S. 58; *United States* v. *Field,* 193 F. 2d 92 [2d Cir. 1951], *cert. dism.* 342 U. S. 908), it was not required here since any information obtained from the individual could not have been used against him and since the corporation had no privilege to waive (Point III, *infra*).

Moreover, if appellant deemed the condition unreasonable and regarded itself as otherwise entitled to the contracts in question, the time to complain was *before* the contracts were signed and the proper procedure was by way of a proceeding in the nature of mandamus pursuant to Article 78 of the New York Civil Practice Law and Rules. See e.g., *Dictaphone Corporation* v. *O'Leary,* 287 N. Y. 491, 41 N. E. 68 (1942). Having failed to raise the question at the proper time, appellant has waived, by contract, all right to raise it now.

POINT II

The propriety of the disqualification of appellant corporation has not been finally adjudicated by the State Courts. Accordingly, the decision of the New York Court of Appeals is not final. The refusal of the Court of Appeals to reach the issue rests on an independent and adequate State ground.

The only issues which directly concern appellant in the instant case are whether a reasonable condition was imposed on it and whether or not any circumstances exist which would make the otherwise reasonable condition unreasonable with respect to it. As we have said, the condition is reasonable and necessary and, in any event, appellant has waived the right to challenge the application of such condition in the contract (Point I, *supra*).

Appellant, nevertheless, contends that notwithstanding the reasonableness of the condition, it was a denial of due process to disqualify it on the basis of Mr. Campbell's

refusal to waive immunity since Mr. Campbell resigned his presidency of appellant before the disqualification. Under the facts of their case (*supra*, pp. 3-5) the contention is, indeed, bizarre. In any event, it is the ordinary rule that the acts of an officer are imputed to the corporation. *United States* v. *Acme Process Co.*, 385 U. S. 138, 147. Nor should Mr. Campbell's resignation relieve appellant of its contract where the resignation obviously was designed to head off investigation by the public authorities. The Court of Appeals so held in this case. However, the Court made no factual findings with respect to whether or not appellant should be relieved of its disqualification. It held, rather, that for removal of the disqualified, a proceeding under Public Authorities Law, § 2603 is "appellant's exclusive remedy". 20 N. Y. 2d at 377.

That section provides for a special proceeding in the State Supreme Court to remove the disability on a petition:

> "[S]etting forth grounds, including that the cooperation by petitioner with the grand jury at the time of the refusal was such, and the amount and degree of control and financial interest, if any, in the petitioning firm, partnership or corporation by the member, partner, officer or director who refused to waive immunity is such that it will not be in the public interest to cancel or terminate petitioner's contracts or to continue the disqualification. . . ."

See also N. Y. General Municipal Law § 103-c; N. Y. State Finance Law, § 139-c.

Appellant, here raising the specific (though not exclusive) issue contemplated by the statute, has not instituted a § 2603 proceeding. Thus, the judgment of the New York Court of Appeals is not final within the meaning of 28 U.S.C. § 1257 with respect to the propriety of the disqualification of appellant. The highest court of the State has pointed out appellant's "exclusive remedy". While

this disposition was not a remand, the effect was the same, to require further proceedings on the issue raised. Moreover, the Court did not direct the result of such a proceeding. It would be open to appellant to establish the facts it alleges. Contrast *Mills* v. *Alabama*, 384 U. S. 214, 217-18; *Pope* v. *Atlantic Coast Line R. Co.*, 345 U. S. 379, 382. Consequently, the determination by the Court of Appeals is not "the final word of a final court". *Market Street Railway Co.* v. *Commission of California*, 324 U. S. 548, 551. See also *Republic Natural Gas Co.* v. *State*, 334 U. S. 62; *Gospel Army* v. *City of Los Angeles*, 331 U. S. 543; *Arnold* v. *United States*, 263 U. S. 427.

The State proceeding contemplated is fully adequate to deal with appellant's claims in a manner consistent with due process of law being, in fact, a full-scale judicial proceeding. The proceeding contemplated may be instituted before or after definitive action is taken when the corporation "has become subject to the cancellation or termination of a contract or disqualification to contract." Even if the hearing was available only after disqualification, appellant would not be deprived of due process of law. *South Carolina* v. *Katzenbach*, 383 U. S. 301; *Lerner* v. *Casey*, 357 U. S. 468; *Bowles* v. *Willingham*, 321 U. S. 503, 520. Indeed, a federal agency may suspend a firm or individual for a temporary period while investigating charges with only a written notice. 41 C.F.R. § 1-1.605—1-1.605.4.

Finally, the refusal of the Court of Appeals to consider the propriety of the instant disqualification rests on the independent and adequate state ground that the proper procedure was not followed. Accordingly, the case is not properly before this Court. *Wilson* v. *Loew's Inc.*, 355 U. S. 597; *Herb* v. *Pitcairn*, 324 U. S. 117, 125-126; *Fox Film Corp.* v. *Miller*, 296 U. S. 207. See *Cramp* v. *Board of Public Instruction*, 368 U. S. 278.

POINT III

Appellant corporation has no interest in and can derive no benefit from Mr. Campbell's privilege against self-incrimination.

Having disclaimed with strong emphasis Mr. Campbell and all of his acts, appellant corporation nevertheless erroneously seeks to invoke, for its own benefit, his privilege against self-incrimination. Thus, appellant contends that the question in the instant case is whether the assertion of the privilege against self-incrimination by Mr. Campbell may result in its disqualification for five years from bidding on public contracts. But this contention has no plausible basis. Appellant is confusing any individual rights of Mr. Campbell with its own rights. Depending on the facts, two basic claims might be open to Mr. Campbell were he a party to this proceeding. He might allege that his privilege against self-incrimination entitles him not to have coerced testimony introduced against him in a criminal proceeding and he might allege that he has a right not to suffer any penalty merely for having invoked his privilege against self-incrimination.

However, since Mr. Campbell did not testify, the first possibility did not arise. Contrast *Garrity* v. *New Jersey*, 385 U. S. 493. Moreover, had he testified, that testimony would be available for use against the appellant corporation. *United States* v. *White*, 322 U. S. 694. Consequently, appellant could not assert Mr. Campbell's rights to advance any claim on its own behalf. For, even had his testimony been offered against Mr. Campbell, it would be excludable only against him.

Of course, the proceedings contemplated would not give Mr. Campbell any claim with respect to the unfair imposition of a penalty (Point I, *supra*). But beyond that, the corporation has no interest in and can claim no derivative benefit from Mr. Campbell's privilege against self-

incrimination. *United States* v. *White, supra; Hale* v. *Henkel,* 201 U. S. 43; *United States* v. *Silverstein,* 314 F. 2d 789 (2d Cir.), *cert. denied* 374 U. S. 807. It cannot claim that any alleged impairment of Mr. Campbell's right to exercise the privilege gives it a right to assert the protection of his privilege for its own benefit. *In re Gibraltar Amusements Ltd.,* 291 F. 2d 22 (2d Cir. 1961), *cert. den.* 368 U. S. 925; *United States* v. *Guterma,* 272 F. 2d 344, 346 (2d Cir. 1959); *Lagow* v. *United States,* 159 F. 2d 245 (2d Cir. 1946). Any such right of Mr. Campbell would result from a claim of an unfair imposition of a penalty on him. The corporation cannot substitute the imposition of any alleged penalty on itself to complete the relationship required before Mr. Campbell could assert such claim of impairment.

The impairment of a personal right of necessity depends upon an identity between the one threatened and the one alleged to be harmed. Otherwise the right at issue, here the privilege against self-incrimination, simply is not violated. Moreover, since the corporation cannot, in any event, assert a privilege against self-incrimination (*United States* v. *White, supra*), it should not be permitted to do by indirection what it cannot do directly and assert for another a privilege it cannot assert for itself. Contrast *Zwick* v. *Freeman,* 373 F. 2d 110 (2d Cir. 1967), *cert. denied* 389 U. S. 835.

This case is, thus, wholly unlike *Pierce* v. *Society of Sisters,* 268 U. S. 510 and *Joint Anti-Fascist Refugee Comm.* v. *McGrath,* 341 U. S. 123, relied on by appellant in its brief in opposition to the motion to dismiss or affirm, pp. 11-12. In *Pierce,* this Court held that a school could posit the right of the public to send students there and to pay it tuition. The public had the right to pay the money, the school the right to receive it. Here, only Mr. Campbell has a right to assert. No part of that right flows to the appellant. Thus, whatever appellant may claim, it may

not rely on any asserted violation of Mr. Campbell's rights. Indeed, none has been established.

In *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123, the organization asserted its own right to carry on as an organization without being subjected to listing as a subversive organization. *Id.* at 141. Indeed, the language quoted from the concurring opinion of Mr. Justice Jackson in that case in the brief in opposition to the motion to dismiss or affirm points up its inapplicability (*id.* at 187):

> "The Government proceeds on the basis that each of these associations is so identical with its members that the subversive purpose and intents of the one may be attributed to and made conclusive upon the other. Having adopted this procedure in the Executive Department, I think the Government can hardly ask the Judicial Department to deny the standing of the organizations to vindicate its members' rights."

Appellant is not seeking to vindicate Mr. Campbell's rights. It is urging that the existence of his rights gives it rights too, in its own behalf. In *Pierce*, the appellant had an independent economic right to solicit students from the public. Here, appellant relies on Mr. Campbell's right to *create* its own. In *Joint Anti-Fascist Refugee Committee*, the organization and its members were identical. Here, they are not. Indeed, appellant insists on this lack of identity by asserting that Mr. Campbell has severed all connection with it.

CONCLUSION

Since any claim by the appellant corporation that it has been denied due process of law must have a basis other than the privilege against self-incrimination, and since it has failed to establish any such basis, the decision of the New York Court of Appeals should be affirmed.

Dated: New York, New York, April 9, 1968.

Respectfully submitted,

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SUPREME COURT, U. S.
FILED
APR 11 1968
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 673

GEORGE CAMPBELL PAINTING CORP.,
Appellant,

against

WILLIAM REID, FRANCIS V. MADIGAN, IRA S. ROBBINS, Members of the New York City Housing Authority, and THE NEW YORK CITY HOUSING AUTHORITY,
Appellees.

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ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF OF APPELLEE NEW YORK CITY HOUSING AUTHORITY

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The text insofar as pertinent herein of Sections 2, 3, 151, 157(1) of the Public Housing Law are set forth in the Appendix to this Brief. Said sections are published in McKinney's Consolidated Laws of New York, Annotated Book 44A. There are also set forth therein, Article 18, Section 1 of the New York State Constitution and Chapter 645, Laws of 1964 (Public Authorities Law 2604).

IN THE

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OCTOBER TERM, 1967

No. 673

GEORGE CAMPBELL PAINTING CORP.,

Appellant,

against

WILLIAM REID, FRANCIS V. MADIGAN, IRA S. ROBBINS, Members of the New York City Housing Authority, and THE NEW YORK CITY HOUSING AUTHORITY,

Appellees.

GEORGE CAMPBELL PAINTING CORP.,

Appellant,

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Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF OF APPELLEE NEW YORK CITY HOUSING AUTHORITY

Statement of Facts

Appellee New York City Housing Authority is a public corporation created by the State of New York, and with other such housing authorities is declared by the New

York Public Housing Law to be "agencies and instrumentalities of the State" (McKinney's Consolidated Laws of New York, V. 44A, Sections 2, 3 subd. 2, and 401) (App. 37-38),* established to carry out the functions of slum clearance and provision of low-rent housing for persons of low income provided for in Article 18, Section 1 of the New York Constitution (McKinney's V. 2, part 2, p. 475) (App. 40).

After public bidding and award pursuant to Section 151 of the Public Housing Law (App. 39) three written contracts for maintenance painting of appellee's projects were entered into between appellant and appellee (A. 51, 79) [while not printed in the Appendix or the Record in the court below, these contracts were incorporated therein by reference (A. 79, Hessel affidavit, Par. 6)].

The respective contracts were executed on behalf of appellant by George Campbell, Jr. as its President (A. 79) on October 15, 1964, October 20, 1964 and November 30, 1964, respectively (see also, A. 110-112). In addition to other items, George Campbell, Jr. executed, in each of such contracts, the Statement of Non-Collusion required to be contained therein by Section 2604 of the Public Authorities Law (App. 41), as then in effect by virtue of Chapter 645 of the Laws of 1964, effective September 1, 1964 (McKinney's Session Laws of New York—1964, p. 1023).

Each contract included provisions, set forth in the Appendix in full (A. 80-81), which in substance specified that upon refusal of any person, when called before a Grand Jury to testify as to transactions or contracts had with the State or its agencies, including public authorities, to sign a waiver of immunity against criminal prosecution, or to

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* Reference to the joint Appendix is designated "A" followed by the page number. Reference to the Appendix to this Brief is designated "App." followed by the page number. Reference to Appellant's Brief is designated "Ap. Br." followed by the page number.

answer relevant questions concerning such transactions or contracts:

(a) such person, and any firm of which he is a member, partner, officer or director shall be "disqualified" from thereafter bidding upon or receiving awards of contracts with appellee for five years thereafter; and

(b) the contract may be cancelled and terminated.

Like the Statement of Non-Collusion above referred to, these standard provisions of the contracts were mandated by the Public Authorities Law, in this instance Section 2601 (A. 81; Ap. Br. 21-22).

Upon learning that a Grand Jury investigation was being conducted by the District Attorney of New York County into bid rigging, bribery, conspiracy and other crimes in connection with contracts of appellee and other public agencies (A. 51-52, 85, 106), and that appellant's officers could be expected to be subpoenaed therein and requested to waive immunity, its President, George Campbell, Jr., purportedly resigned that office and as a Director, and surrendered all his stock in appellant corporation (A. 52, 95-98). All this was expressly in contemplation of his imminent call before the Grand Jury and his intent to refuse to waive immunity or to answer questions (A. 52). Further, it was with full knowledge and advice by counsel of the "penalties that would result" if any officer refused to waive immunity (A. 52). Indeed, appellant's brief states even more specifically that its officers "were told of the disqualification provisions of the Public Authorities Law" (Ap. Br. 5).

Having been informed by the District Attorney of George Campbell, Jr.'s refusal to sign a waiver of immunity (A. 85, 105), appellee forwarded a letter to appellant cancelling and terminating the contracts, and advising that it

would be "disqualified" from further bids upon or award of contracts of appellee for a period of five years. This was based expressly upon the contract provisions, and no reference was made in the letter to the provisions of the Public Authorities Law (A. 106-107).

Appellant's counsel by letter (A. 19-22) vigorously protested this action, requested a hearing, and expressly based such protest upon the alleged misinterpretation of the contract provisions by appellee. This was predicated upon the contention that George Campbell, Jr. had assertedly resigned his offices and surrendered his stock, had thereby severed all official relationship with appellant before his call to the Grand Jury and refusal to waive immunity, and was therefore not then an "officer" within the meaning of the contract provision in question (A. 21).[1]

Throughout all the subsequent litigations brought by appellant this contention of misinterpretation of the contract provisions was consistently maintained, and made the entire basis for its demand for relief (A. 10, 25, 51, 53, 69, 72, 119). No other issue tendered by appellant, constitutional or otherwise, appears in the record, the constitutional issue having been raised only on appeal, and solely by briefs of counsel. Nor did the New York Supreme Court or the Appellate Division, in their decisions, make any reference to constitutional questions, basing their decisions solely upon the issue of contract interpretation tendered by appellant, and appellee's defenses of availability of other exclusive judicial remedies (A. 34, 130; 48 Misc. 2d

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[1] Appellant's Brief, page 6 says: "Indeed, in appellee's motion to this Court to dismiss the appeal (pp. 12, 19-21), they stressed the fact that, at that time, George Campbell, Jr. was a complete stranger to appellant." This is out of context. What was clearly indicated in the motion was that this was *appellant's* contention, based upon George Campbell, Jr.'s "asserted divestiture", and that *appellant* "firmly and adamantly maintained" that he was legally and actually a total stranger to appellant corporation. The record shows that appellee disputed the effectiveness of this "asserted divestiture" (A. 89, 91-102).

544; 26 A. D. 2d 912). The New York Court of Appeals, however, has stated in its opinion upon affirming that it held Section 2601 of the Public Authorities Law constitutional (A. 134; 20 N. Y. 2d 370, 229 N. E. 2d 602), and upon this finding the jurisdiction of this Court is invoked.

Although appellant's notice of claim (A. 24-27), which was a prerequisite to the institution of litigation against appellee (Public Housing Law, Section 157, subd. 1; App. (40), sought damages for wrongful cancellation of the contracts and their reinstatement, as well as removal of the disqualification of appellant from bidding, the proceeding and action thereafter instituted, and now the subjects of the appeal to this Court, were grounded solely upon the disqualification (A. 13, Petition, Par. 39), and the sole relief sought was the enjoining or removal of such disqualification (A. 13, 49, 70).

In the nature of affirmative defenses to the relief demanded, appellee set forth two principal contentions: (1) that appellant's exclusive remedy for removal of the disqualification was the judicial proceeding provided by Section 2603 of the Public Authorities Law (App. Br., 23-24; A. 86-88, 103-104), and (2) that both appellant and its President, George Campbell, Jr., had theretofore been indicted by the New York County Grand Jury on three counts of perjury in the first degree by reason of the falsification of the statement of non-collusion executed by George Campbell, Jr. in each of the contracts in question, as above noted (A. 102). A copy of such indictment is in the record (A. 110-113),[2] and was urged upon the

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[2] This indictment was handed down prior to the proceedings in the New York Supreme Court, and is accordingly contained in the record (A. 110-113). It is respectfully considered appropriate that this Court be informed of what has transpired with respect thereto since the proceedings were terminated in the New York Supreme Court, where the record was made, as well as subsequent to the determination of the appeals in the New York Court of Appeals.

(Footnote continued on following page)

courts below as a bar to the equitable relief sought (A. 102, 104).

It will be noted that antedating the Article 78 Proceeding and the plenary action set forth in the record appellant had commenced a prior Article 78 Proceeding, which contained a cause of action for relief from the disqualification under Section 2603 of the Public Authorities Law (erroneously referred to as Section 103(c) of the General Municipal Law, which is identical, but covers Municipal agencies other than public authorities), naming as parties thereto, as provided in Section 2603, the Attorney General of New York and the District Attorney of New York County; and that this proceeding had been voluntarily discontinued by appellant (A. 35-36, 77-78). It will further be noted that the New York Court of Appeals has held such Section 2603 proceeding to be appellant's exclusive remedy for the relief it seeks (A. 135; 20 N. Y. 2d 370, 376-377).

(Footnote continued from preceding page)

The final Order and Judgment of the Supreme Court in the Article 78 Proceeding was made December 14, 1965 (A. 30), and the final Order appealed from in the Plenary Action was made March 18, 1966 (A. 122). Thereafter, on October 17, 1966 George Campbell and the appellant (sub nom. George Campbell & Co., Inc.—see A4 Par. 7) were further indicted by the New York County Grand Jury, under Indictment No. 3954-66, for Conspiracy to Prevent Competitive Bidding on Public Contracts. Had this occurred during or prior to the proceedings in the New York Supreme Court it certainly would further have been made part of the record, as was the indictment for Perjury above referred to.

After the decision by the New York Court of Appeals on July 7, 1967 (A. 39, 42, 131, 134; 20 N. Y. 2d 370), and while the appeal to this Court was pending, George Campbell, Jr. and appellant pleaded guilty during trial of the Conspiracy case to cover both the Conspiracy and the Perjury indictments. Copies of the Certificates of the County Clerk and Clerk of the Supreme Court, New York County, to that effect, are set forth in the Appendix to this Brief (App. 42-43).

The foregoing is respectfully submitted for such relevance as this Court may deem appropriate to attribute thereto (Cf. Thorpe v. Housing Authority, 386 U. S. 670, 671-672).

Appellant has stated that the work performed for appellee by it and its predecessor constituted less than fifteen percent of its total annual volume (A. 10).

Summary of Argument

Appellee contends that:

1. Should Section 1123 of the New York City Charter, in issue in the *Gardner* (No. 635) and *Sanitation* (No. 823) cases, be held constitutional, then similarly Section 2601 of the Public Authorities Law, in issue in this case, should be so held. In the light of the particular circumstances of this case, however, the converse is not true, and the determination of the New York Court of Appeals appealed from herein should nevertheless be affirmed regardless of the outcome of the *Gardner* and *Sanitation* cases.

2. Statutes like Section 1123, requiring public employees to waive immunity and to answer questions relevant to their qualifications for employment, on pain of dismissal, have been held constitutional by this Court, and should continue so to be held. Section 2601 of the Public Authorities Law is directed to a similar purpose in the public interest, to wit, the ascertainment of the qualifications of public contractors, and they should be held to no less an obligation.

3. The requirement that appellant's officers waive immunity and answer relevant questions before a Grand Jury on pain of disqualification from future bidding, as mandated by Section 2601, was a valid condition to the contracts.

ARGUMENT I

A public contractor should be held to requirements and standards of candor and disclosure of information bearing upon his qualifications and responsibility at least as extensive as those which may constitutionally be imposed upon public employees. Accordingly, if waiver of the Fifth Amendment privilege under threat of dismissal may constitutionally be required of public employees, *ipso facto* the requirement of such waiver by a public contractor under threat of disqualification from bidding should be held constitutionally permissible.

The New York Court of Appeals cited, as authority for its determination upholding the constitutionality of Section 2601 of the Public Authorities Law in this case, its decision in *Matter of Gardner* v. *Broderick*, 20 N. Y. 2d 227, handed down at the same time (20 N. Y. 2d 370, 376). In the *Gardner* case it upheld the constitutionality of the requirement of Section 1123 of the New York City Charter and Article I, Section 6 of the New York Constitution that upon pain of dismissal every public employee must waive his Fifth Amendment privilege and answer questions when called to testify before a Grand Jury concerning his conduct in office. Gardner, a New York City policeman, had been dismissed pursuant to Section 1123 for his refusal to do so.

The constitutionality of Section 1123 of the Charter was also in issue in the case of *Uniformed Sanitation Men Association, Inc.* v. *Commissioner of Sanitation, Inc.*, decided by the U. S. Court of Appeals, U.S.C.A., 2d Circuit, 383 F. 2d 364 (1967) (hereinafter the "Sanitation" case). The dismissal of New York City sanitation men, pursuant to Section 1123, for refusal to waive immunity and

to answer questions either before the City Commissioner of Investigation or the Grand Jury was therein also sustained as constitutional.

The constitutional issues on this point in the *Gardner* and *Sanitation* cases are accordingly basically identical. The appeals therein to this Court (Gardner, No. 635; Sanitation, No. 823) are to be argued together with the instant appeal. Under the circumstances it appears quite clearly that a determination in those cases upholding the constitutionality of Section 1123 will have a major, if not conclusive, impact upon the constitutional issue raised in the case at bar. But, while appellee contends that if the constitutionality of Section 1123 of the Charter is upheld *ipso facto* that of Section 2601 of the Public Authorities Law should likewise be upheld, it will be shown in Argument IV below that the converse is not necessarily true, and that in any event, in the particular circumstances of this case the judgment of the New York Court of Appeals should nevertheless be affirmed.

A. Public contractors, like public employees, may constitutionally be required to waive immunity and to furnish information relevant to their qualifications.

Appellee respectfully submits that if the requirement of waiver of the Fifth Amendment privilege by public employees on pain of dismissal, pursuant to Section 1123 of the New York City Charter, is held to be constitutionally permissible in the *Gardner* and *Sanitation* cases, then *a fortiori,* or at least equally, the requirement of Section 2601 of the Public Authorities Law, and the contract provisions mandated thereby, that public contractors like appellant similarly waive such privilege on pain of disqualification from bidding, should also be held valid.

That in this respect a public contractor ought at the least to be equated with public employees has perhaps best been stated in *United States ex rel. Laino* v. *Warden,* 246

F. Supp. 72 (S.D.N.Y. 1965), aff'd. 355 F. 2d 208 (2d Cir. 1965), as follows: "We affirm on Judge Tenney's opinion below, reported at 246 F. Supp. 72 (1965)". Judge Tenney, in an exhaustive opinion upholding the constitutionality of Section 103-b of the General Municipal Law (246 F. Supp. 72, 98), which is a counterpart of Section 2601 of the Public Authorities Law (246 F. Supp. 72, 92), said:

> [p. 94]: "The requirement in Section 103-b, that public contractors waive immunity before investigative bodies on the sanction of possible disqualification, has the same valid basis as those involving public employees.
>
> "Accordingly, it can be argued that the sanction of possible disqualification present in Section 103-b is predicated on the lack of candor and frankness which is expected of one doing business with the state, and that such lack of cooperation and failure to discharge one's responsibility is incompatible with the position held, rather than a disqualification, *eo instantio*, based solely on one's invocation of his Fifth Amendment right. This rationale is, of course, the saving grace whereby prior sanctions of this nature have withstood judicial scrutiny."
>
> [p. 95]: "Moreover, in one sense relator owed a higher duty to freely discuss and answer questions relating to the performance of his official acts than a Government employee. In the case of a public employee, the state has at least a choice of hiring or not hiring an individual, whereas in the case of a contractor the state's ability to choose is severely restricted."
>
> [p. 96]: "Similarly in the case at bar, relator possessed no inalienable right to contract with the state. His right in that regard could be tempered by reasonable conditions imposed upon him, one of them being the necessity of being candid with the authorities and giving full answers to questions propounded by in-

vestigative bodies, the answers to which would reflect on his qualifications and fitness to utilize the privilege of doing that business. Accordingly, it is not unreasonable for the state to expect that business done with it was aboveboard and that persons doing that business would be frank and assist in the investigation of their qualifications. To impede that investigation by any device is to preclude the state from judging those qualifications and breach the trust imposed on a 'quasi' governmental official such as a public contractor."

B. Public Authorities Law, Section 2601 is no less designed to obtain information as to qualifications than are similar statutes relating to public employees.

Appellant appears to concede that if the inquiry at which the waiver of the privilege is required is related to "* * * a legitimate inquiry of the person's qualifications for such contract, public employment or license, the failure to be candid justified the sanction, without offending the due process clause" (Ap. Br. 10). It then goes on to assert, however, that the waiver required by "The Public Authorities Law is designed solely to punish private contractors who exercise their privilege against self-incrimination in the Grand Jury room" (Ap. Br. 13-14), and, in effect, that it has no relation to the purpose of eliciting information as to the "qualifications" of such contractor, as distinguished from statutes imposing the penalty of dismissal upon public employees for like exercise of such privilege.

Appellant could hardly be more clearly in error. It is the province of the District Attorney to provide for punishment. Appellee, as a state agency charged with protecting the public interest and public funds is, on the other hand, interested only in the responsibility and "qualifications" of those with whom it contracts. Indeed, it is to be noted that appellee has the right and duty, under Section 151 of the Public Housing Law, to "* * * make rules and regulations

governing the qualification of bidders * * *" or even to "prequalify" them. Why, therefore, is a statute such as 2601 or 2602 of the Public Authorities Law to be considered any the less designed to elicit legitimate information as to the qualifications of such contractors than is Section 1123 of the Charter, or similar governmental requirements where, on this basic ground, this Court has consistently upheld the constitutionality of the dismissal or disqualification of public employees? *U. S. ex rel. Laino* v. *Warden, supra; Beilan* v. *Board of Public Works,* 357 U. S. 399 (1958); *Lerner* v. *Casey,* 357 U. S. 468 (1958); *Nelson* v. *Los Angeles,* 362 U. S. 1 (1960); *Garner* v. *Board of Public Works,* 341 U. S. 716 (1951); *Orloff* v. *Willoughby,* 345 U. S. 83 (1952).

See, also,

> Wigmore, Treatise, Law of Evidence, V. 8, Sections 2275 and 2275(a), pp. 435-437, *3rd Ed.,* and footnote in *United States* v. *Warden of Wallkill Prison,* 246 F. Supp. 72, 94.

Furthermore, while statutes like Section 1123 of the Charter require answers to be given by public employees in the broad field "* * * regarding the property, government or affairs of the city * * *", Sections 2601 and 2602 of the Public Authorities Law require answers considerably more limited and closely related to the "qualifications" of a public contractor *per se,* in that they are designed to elicit information restricted to "* * * any transaction or contract had with the State", its political subdivisions and agencies, including public authorities like appellee (cf. *Slochower* v. *Board of Higher Education,* 350 U. S. 551, 558; and see *Spevack* v. *Klein,* 385 U. S. 511, concurring opinion of Mr. Justice Fortas, 358 U. S. at 519).

Finally, the history and purpose of Sections 2601 and 2602 demonstrate that they were expressly adopted with the intent, not to effect punishment, but to obtain informa-

tion which would enable the State and its agencies to weed out and "disqualify" irresponsible and corrupt contractors. In approving Chapter 605, Laws of 1959, adding these sections to the Public Authorities Law, the Governor of New York said (McKinney's 1959 Session Laws of New York, pages 1757-1758):

> "This bill provides that a person who refuses to testify before a grand jury with respect to a contract or transaction had with the State or one of its subdivisions will be barred from entering into public contracts for five years and may lose his rights under the terms of all future public contracts which may be pending. The word person is defined to include, under certain circumstances, a partnership and a corporation.
>
> "In a recent grand jury investigation, a number of persons who had transacted business with a governmental agency refused to answer questions about those transactions put to them by the grand jury. In its report, the grand jury recommended consideration of amendments to the law *which would disqualify such persons from further transactions with public agencies.*
>
> "Unlike a private person who may contract with whom he wishes, a public agency usually lets contracts by public auction and is required to accept the lowest bid. For that reason, *it would seem appropriate to disqualify the bids of persons who are unwilling to disclose to a grand jury facts relating to some prior contract with the public.* Likewise, it would seem appropriate that public contracts should provide that the benefits accruing under them be available only so long as the beneficiary is willing, when required by a grand jury, to disclose any information he may have as to a public contract" (Emphasis supplied).

C. Appellant's assertion that the Grand Jury testimony of its officer, if given, would not be available to evaluate its qualifications is without basis.

But, asserts appellant (Ap. Br. 13-14), the waiver required of its officer was solely before a Grand Jury, its proceedings are secret, and it is not authorized to inquire into or render reports on the fitness of non-public employees. Therefore, it is implied, no information relating to appellant's qualifications could have been disclosed even if answers had been given; from which it follows that its disqualification was an unconstitutional punishment based solely upon the exercise of the privilege against self-incrimination. For these propositions there are cited Sections 253, 253-a and 258 of the New York Code of Criminal Procedure (Ap. Br. App. 25-28), and a number of New York cases (Ap. Br. 13).

Again appellant is very much in error. First, it may be seen from the Governor's message on approval of Sections 2601 and 2602 of the Public Authorities Law, that the very birth of those statutes stemmed from a Grand Jury report on fraud and corruption in public contracts, and their clear intent and purpose was to utilize information brought out before Grand Juries "—to disqualify the bids of persons who are unwilling to disclose to a grand jury facts relating to some prior contract with the public."

Second, Section 253-a expressly provides, in its subdivision 1(c), that a Grand Jury may submit a report "proposing recommendations for legislative, executive or administrative action in the public interest based upon stated findings." And by subdivision 2 such report may be made a "public record" upon order of the Court to which it is submitted.

Third, Section 258 imposes secrecy only upon members of the Grand Jury as to what they said, or in what manner they voted upon matters before them. It has been settled that under New York law the Court may in a proper

case order the disclosure of Grand Jury minutes, including their use in disciplinary proceedings against public officials, in the public interest and in the exercise of its judicial discretion. Application of City of New Rochelle, 35 Misc. 2d 254; Application of Scro, 108 N.Y.S. 2d 305; *In re Peo.* v. *Sawpit Gymnasium,* 60 N.Y.S. 2d 593 (not officially reported); *In re Quinn,* 267 App. Div. 913, aff'd 293 N. Y. 787; New York Code of Criminal Procedure, Section 95(2-t).

Fourth, the New York cases cited by appellant (Ap. Br. 13) are completely inapropos. The sole appellate case cited is *Wood* v. *Hughes,* 9 N. Y. 2d 144 decided in 1961. There the New York Court of Appeals held, by a sharply divided Court, that the century old practice of making Grand Jury "presentments" was not authorized by any New York statute, and that absent such statutory authority such presentments could not be made. For the express purpose of overruling this decision Section 253-a of the Code of Criminal Procedure was enacted by the New York Legislature by Chapter 350 of the Laws of 1964, effective July 1, 1964. (McKinney's Session Laws of New York, 1964). This was in compliance with the Governor's message to the Legislature of that year reading, in part, as follows:

> "*Restoration of the Grand Jury Power to Make Presentments.*
>
> In 1961, the Court of Appeals ruled that the grand jury did not have statutory power to make public reports calling attention to unsavory conditions and recommending reforms, although the practice had been followed for more than a century and a half. In the past these presentments have served to arouse the public to fight organized crime, overhaul the parole system, rectify corrupt conditions and halt fraudulent practices.

> It is essential to confirm the grand jury's power to make proper presentments directed to fraud, corruption and misconduct by public officials. I recommend legislation designed to restore this power, with appropriate safeguards against abuse, so that the public can continue to be informed of facts bearing importantly on its welfare."
>
> (McKinney's New York Session Laws, 1964, p. 1934).

The sole case cited by appellant which followed the enactment of Section 253-a of the Code of Criminal Procedure, to wit, *In re Grand Jury,* January, 1967, 52 Misc. 2d 895, decided by the New York Supreme Court in 1967 (Ap. Br. 13) expressly found that where, in the course of an authorized criminal inquiry, facts are developed which require ". . . executive or administrative action in the public interest . . .", under Section 253-a: ". . . the Grand Jury may make recommendations based on stated facts found in the evidence before it for action by the bodies or officers mentioned" (52 Misc. 2d at 896).

And finally, it will be noted that in the *Gardner* case (No. 635; 20 N. Y. 2d 227) the police officer involved had, like appellant's officer in the instant case, refused to waive immunity before a Grand Jury. The New York Court of Appeals sustained his dismissal because the answers he was required to give under a waiver of immunity ". . . patently bore upon his fitness to remain in office, information which the public had a right to know and the petitioner was under a duty to reveal" (20 N. Y. 2d at 230). Obviously, this could only mean that such information is not, under New York law, required to be kept secret in such circumstances although produced before a Grand Jury, and may be made public (cf. *Stevens* v. *Marks,* 383 U. S. 234 (1966)). And see, *In re Quinn,* 293 N. Y. 787, *supra.* Such interpretation of New York law by the highest Court of the State has consistently been held binding upon this Court.

Beilan v. *Board of Ed.*, 357 U. S. 399, 404;
Barsky v. *Board of Regents*, 347 U. S. 442, 448;
Nelson v. *County of Los Angeles*, 362 U. S. 1, 6;
May v. *Andersen*, 345 U. S. 528, 534, 535;
Hicklin v. *Coney*, 290 U. S. 169, 172.

D. The question of a hearing.

Although appellant has made no point of it as such in its brief, the record shows that it did base its charge of arbitrary action by appellee, at least in part, on the fact that no hearing was granted it with respect to the disqualification (A. 11, 20, 22, 23). Inasmuch as that question may arise in considering whether "due process" was afforded it in the action taken by appellee, it will now be discussed. The question of a proper hearing may also arise in Gardner (No. 635) and Sanitation (No. 823).

In *Slochower* (350 U. S. 551, *supra*), this Court pointed out:

> [350 U. S. at 554]: "The Court of Appeals of New York—has authoritatively interpreted § 903[3] to mean that 'the assertion of the privilege against self incrimination is equivalent to a resignation'. Daniman v. Board of Education, 306 N. Y. 532, 538, 119 N. E. 2d 373, 377. Dismissal under this provision is therefore automatic and there is no right to charges, notice, hearing, or opportunity to explain."

While the Slochower dismissal was reversed by this Court it was not on the basis that § 903 was unconstitutional because, as the New York Court of Appeals thus interpreted it, it actually precluded a hearing. That Slochower did not hold § 903 itself unconstitutional in this

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[3] § 903 of the New York City Charter was identical with and was the predecessor of § 1123, in issue in the *Gardner* and *Sanitation* cases.

or any other respect will be hereafter discussed.[4] In fact, this Court pointed out in Slochower that it had dismissed the appeal of thirteen other individuals summarily dismissed under § 903 along with Slochower for pleading their privilege against self-incrimination "for want of a properly presented federal question", in *Daniman* v. *Board of Education,* 348 U. S. 933 (350 U. S. at 555, Note 2).

In *Lerner* v. *Casey,* 357 U. S. 468 (1958), this Court said:

> [357 U. S. at 473]: "It is said that New York's statute deprives him of procedural due process, in that it provides for dismissal of employees in the first instance without a statutory right to a hearing, opportunity for cross examination, or disclosure of the evidence on which dismissal is based. However, appellant is in no position to complain of procedural defects in the statute. His own refusal to answer blocked proceedings at his appearances before the Department of Investigation, and more important he failed to pursue his administrative remedy by appealing to and obtaining a hearing before the Civil Service Commission."

See also, *Nelson* v. *County of Los Angeles,* 362 U. S. 1 (1960); *Orloff* v. *Willoughby,* 345 U. S. 83.

The failure of appellant in the case at bar to pursue the adequate and exclusive *judicial* remedy afforded by Section 2603 of the Public Authorities Law should be no less fatal to its appeal here than was that of Lerner to pursue his *administrative* remedy. As interpreted by the New York Court of Appeals such judicial proceeding would have given appellant full opportunity to air its contention that its erstwhile president had legitimately resigned and severed all connection with it, and that by reason thereof

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[4] Petitioner's Brief (pp. 9-12) in the *Sanitation* case contends that it did. And see Ap. Br. 9-10 in the case at bar.

no "vicarious penalty" should have been visited upon it for his refusal to waive his privilege against self-incrimination (see Ap. Br. 15-17).[5] For, said the Court of Appeals:

> [20 N. Y. 2d 370, at 376-377]: "There may be times when the statute will operate to penalize a corporation which had severed its connection with the recalcitrant officer and which has otherwise been cooperative. The Legislature has, however, recognized this problem and has specified a procedure by which disqualification can be removed under such circumstances. (Public Authorities Law, § 2603.) The appellant's exclusive remedy is the procedure outlined in that statute."

That such interpretation of the statute by the highest Court of New York is binding upon this Court has already been seen (*supra*, p. 16).

Actually, the rationale to be distilled from this Court's rulings sustaining the dismissal or disqualification of public employees—with whom, it is respectfully submitted, public contractors should at least be equated—for refusal to waive their privilege against self incrimination or to answer relevant questions, has little to do with hearings or their requirement. Where hearings have been held they have merely been *pro forma* and of little or no defensive value to the person involved, since their net effect has been merely to record the undisputed fact that such person had, indeed, refused to waive or answer questions.

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[5] Actually § 2603 affords not only the remedy of a judicial hearing, but one which would preclude any harm at all to the contractor if he could convince the Court of a justifiable basis for restraining the imposition of the penalty. For subdivision 2 of § 2603 states that upon the filing of his petition the Court may stay the cancellation or termination of any contracts pending a decision thereon (Ap. Br. 24). See *Bowles* v. *Willingham*, 321 U. S. 503, 520, and *Porter* v. *Investors Syndicate*, 286 U. S. 461, 470-471, where such provisions were held to constitute due process.

This was certainly the case in *Gardner* (No. 635) and *Sanitation* (No. 823). In *Beilan* v. *Bd. of Education,* 357 U. S. 399, the statute equated such refusal with "incompetency", a statutory ground for dismissal, and all that was brought out at the hearing was the undisputed fact that such refusal had, indeed, occurred. Said this Court in sustaining the dismissal:

> [357 U. S. 399, at 404]: "The only question before us is whether the Federal Constitution prohibits petitioner's discharge for statutory 'incompetency' based on his refusal to answer the Superintendent's questions."

In *Garner* v. *Bd. of Public Works,* 341 U. S. 716, the mere refusal to take an oath and execute an affidavit relating to subversive activities or affiliations was held sufficient and valid ground for statutory dismissal, after a hearing which simply brought out that undisputed fact.

In *Nelson* v. *County of Los Angeles,* 362 U. S. 1, a permanent public employee was given a hearing which simply confirmed his undisputed refusal to waive his privilege and answer questions. The hearing resulted in a finding of "insubordination" solely by reason thereof, which, under the statute, was cause for discharge. A temporary employee was summarily discharged for the same reason and on the same basis and refused a hearing, none being provided by statute for a temporary employee. This Court held both dismissals constitutionally valid.

ARGUMENT II

Statutory provisions which require public employees and public contractors to waive their privilege against self incrimination and to answer questions relevant to their fitness or qualifications, on pain of dismissal or disqualification, are constitutionally valid.

The *Gardner* (No. 635) and *Sanitation* (No. 823) cases, and with them, presumably, the case at bar, are patent

sequels to *Garrity* v. *New Jersey*, 385 U. S. 493 (1967), and *Spevack* v. *Klein*, 385 U. S. 511 (1967), and will undoubtedly supply the answer to the Court's present views on the constitutional question in those cases expressly not reached (385 U. S. at 516, Note 3; and see concurring opinion of Mr. Justice Fortas in *Spevack*, 385 U. S. at 519-520). That is the question whether a public employee (in *Garrity*, a policeman) may be dismissed who invokes the privilege against self incrimination when asked questions relating to his conduct in office, especially when, as Justice Fortas stated, they are

> "* * * questions specifically, directly and narrowly relating to the performance of his official duties.* * *." (385 U. S. at 519)

Here, in a nutshell, is the rationale which underlies cases like *Beilan, Garner, Nelson, Lerner, Orloff* v. *Willoughby*, 345 U. S. 83, and *Laino*, and by which they may be harmonized with cases like *Slochower, Garrity, Spevack, Konigsberg* v. *State Bar of California*, 353 U. S. 252 (1952), *Malloy* v. *Hogan*, 378 U. S. 1 (1964), *Griffin* v. *California*, 380 U. S. 609, and *Stevens* v. *Marks*, 383 U. S. 234 (1966). A person not related to governmental functions may not be made to suffer a penalty for refusing to waive his Fifth Amendment privilege or to have that made "costly" (e.g., *Griffin, Malloy, Spevack*), and no one, private or public, may be compelled to testify against his will and thereby be subjected to actual or threatened criminal prosecution (*Stevens, Garrity, Malloy, Murphy* v. *Waterfront Commission*, 378 U. S. 52 (1964)). But the overriding public interest of the State in preserving the integrity, responsibility and qualifications of its public servants (*Beilan, Garner, Nelson, Lerner, Orloff*), and in eliminating those not qualified by reason of fraud and corruption from contracting with it (*Laino*), tips the scale of accommodation between private rights and the public interest in favor of

the constitutionality of statutes like Section 1123 of the New York City Charter and 2601 of the Public Authorities Law; provided that they operate only to the extent of disqualifying or dismissing such public employees or public contractors while preserving to them their unquestioned constitutional right to remain silent, if they so choose.

Slochower was certainly not to the contrary, and did not invalidate then Section 903 (now Section 1123) of the New York City Charter itself, as is now contended. All that was held was that the *application* of the statute in the particular circumstances of that case unconstitutionally invaded Slochower's rights. Said the Court in *Slochower:*

> (350 U. S. at 555): "We do not decide whether a claim under the 'privilege or immunities' clause was considered below, since we conclude the summary dismissal of appellant in the circumstances of this case violates due process of law."

The circumstances referred to by the Court were these: It found, first, that Slochower's dismissal had been predicated upon an inference of guilt derived from the very fact of the invocation of his Fifth Amendment privilege. This the Court vigorously condemned, saying:

> (350 U. S. at 557): ". . . we must condemn the practice of imputing a sinister meaning to the exercise of a person's constitutional right under the Fifth Amendment . . . In Ullman v. United States, 350 U. S. 422, 100 L. ed. 511, 76 S. Ct. 497 . . . we scored the assumption that those who claim this privilege are either criminals or perjurers."

Second, the Court found that the inquiry at which Slochower invoked the privilege was before a Congressional Committee, not a City or State agency, and expressly had no relation either to his qualifications or the "• • • property, affairs or government of the city, or • • • official

conduct of city employees", to which Section 903 limited the waiver requirement (350 U. S. at 558).

Third, the Court found that Slochower had long before given the State authorities full information on the subject of his Communist affiliations, which were the object of the inquiry, that he had been continued for many years in his position with such full knowledge, and that his qualifications for his position were otherwise in no way attacked.

The Court quite clearly indicated, on the other hand, that had the inquiry been properly directed to an ascertainment of his qualifications for continued employment, Slochower, while having the absolute right to refuse to answer on the Fifth Amendment ground, could constitutionally have been dismissed therefor. On this basis the Court distinguished Slochower from *Garner* v. *Board of Public Works*, 341 U. S. 716 (1950), as follows:

> (350 U. S. at 558): "In this respect the present case differs materially from Garner, where the city was attempting to elicit information necessary to determine the qualifications of its employees. Here, the Board had possessed the pertinent information for 12 years, and the questions which Professor Slochower refused to answer were admittedly asked for a purpose wholly unrelated to his college functions. On such a record the Board cannot claim that its action was part of a bona fide attempt to gain needed and relevant information."

And finally, said this Court:

> (350 U. S. at 559): "This is not to say that Slochower has a constitutional right to be an associate professor of German at Brooklyn College. The State has broad powers in the selection and discharge of its employees, and it may be that proper inquiry would show Slochower's continued employment to be inconsistent with a real interest of the State. But there has been no such inquiry here."

That *Slochower* accordingly cannot be construed as having invalidated statutes like Section 1123 of the Charter, involved in the *Gardner* and *Sanitation* cases now before the Court, or Section 2601 of the Public Authorities Law, involved in the case at bar, is further confirmed by the Court's decisions subsequent to Slochower, which was decided in 1955. *Beilan* (1958), *Lerner* (1958), and *Nelson* (1960) each distinguished Slochower on one or more of the grounds above noted, and each held valid the dismissal of a public employee who invoked his Fifth Amendment privilege and refused to answer relevant questions related to his fitness and qualifications for public employment.

It thus becomes clear, as stated above, that whether they sustained or reversed the dismissals involved, the rationale underlying the decisions of this Court to date on the constitutional principle here in question may be summarized thus: A public employee, like all others, has an absolute constitutional right to invoke his Fifth Amendment privilege against self incrimination in any governmental inquiry. He does not, however, have a right to do so and to refuse to answer questions ". . . specifically, directly and narrowly relating to the performance of his official duties . . ." (Mr. Justice Fortas in *Spevack*, 385 U.S. at 519, *supra*) and still retain his public employment.

That a public contractor like this appellant should be subject to no less a burden with respect to questions specifically, directly and narrowly relating to the performance of its public contracts (Public Authorities Law, Section 2601) in order to determine its qualifications for additional such employment would seem inescapably to follow in all reason, logic and equity, as has been so cogently stated by Tenney, D. J. in *Laino, supra.*

ARGUMENT III

The contention that Section 2601 of the Public Authorities Law imposes an unconstitutional condition on doing business with the State or its agencies is without basis.

Appellant asserts that the "condition" provided for in the contracts involved, pursuant to the mandate of Section 2601 of the Public Authorities Law, to wit, that its officers must waive immunity and answer relevant questions before a Grand Jury in order to avoid its disqualification from bidding, is an unconstitutional condition to the granting of a governmental benefit or privilege. For this proposition it cites cases like *Frost* v. *Railroad Commission,* 271 U. S. 583; *Western Union Telegraph Co.* v. *Kansas,* 216 U. S. 1, and others of similar import (Ap. Br. 18-19).

In none of these cases was there involved a contract between the State or one of its agencies for the performance of public work, as does the case at bar, or for the furnishing of materials or similar direct contracts with the State or its agencies. On the contrary, what they involved was strictly such a limitation, condition or imposition on the right to conduct private business or to earn a livelihood within the State[6] as to constitute, variously, a denial of equal protection of the laws, of freedom of contract, of taking of private property without due process, of violation of the commerce clause of the Constitution, or other constitutional infringement.

The *Frost* case is typical of this. There the State prohibited the use of the public highways entirely to the plaintiff, a private carrier, unless it became a public carrier

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[6] It will be noted that appellant asserts that less than fifteen per cent of its annual volume of work was performed for appellee (A10).

subject to all of the regulations, limitations and controls imposed upon a public carrier.

Said the Court:

> (271 U. S. at 592): "Thus, it will be seen that, under the act as construed by the state court, whose construction is binding upon us, a private carrier may avail himself of the use of the highways only upon condition that he dedicate his property to the business of public transportation and subject himself to all the duties and burdens imposed by the act upon common carriers . . . . The requirement does not apply to a private carrier qua private carrier, but to him only in his imposed statutory character of common carrier."

The Court accordingly went on to say that, even assuming that the State would have the right to deny the use of the highways to the plaintiff entirely (without so deciding), such a condition to its use was in violation of the constitutional guarantee of due process, which was here ". . . open to destruction by the indirect but no less effective process of requiring a surrender, which, though in form voluntary, in fact lacks none of the elements of compulsion" (271 U. S. at 593).

The rulings of this Court with respect to conditions and limitations which may properly be included in contracts between the government, State or Federal, or their agencies, with private contractors for the performance of public work or the furnishing of materials or services, are on an entirely different basis.

Thus, in *McMullen* v. *Hoffman*, 174 U. S. 639 (1898), this Court said:

> (At 651): "Upon general principles it must be apparent that biddings for contracts for public works cannot be surrounded with too many precautions for the purpose of obtaining perfectly fair and bona fide bids.

Such precautions are absolutely necessary in order to prevent the successful perpetration of fraud in the way of combinations among those who are ostensible rivals but who in truth are secretly banded together for the purpose of obtaining contracts from public bodies such as municipal and other corporations at a higher figure than they otherwise would."

In *Atkin* v. *Kansas,* 191 U. S. 207 (1903), the Court said:

(at 222-223): "It cannot be deemed a part of the liberty of any contractor that *he* be allowed to do public work in any mode he may choose to adopt, without regard to the wishes of the state. On the contrary, it belongs to the state, as the guardian and trustee for its people, and having control of its affairs, to prescribe the conditions upon which it will permit public work to be done on its behalf, or on behalf of its municipalities." (Emphasis the Court's).

(at 224): "We rest our decision on the broad ground that the work being of a public character, absolutely under the control of the state and its municipal agents acting by its authority, it is for the state to prescribe the conditions under which it will permit work of that kind to be done."

And in *Perkins* v. *Lukens Steel Company,* 310 U. S. 113 (1940), the Court said:

(at 127): "Like private individuals and businesses, the Government enjoys the unrestricted power to produce its own supplies, to determine those with whom it will deal, and to fix the terms and conditions upon which it will make needed purchases."

To similar effect are:

Heim v. *McCall,* 239 U. S. 175, 191 (1915);
People v. *Crane,* 214 N. Y. 154, aff'd *Crane* v. *New York,* 239 U. S. 195 (1915).

The distinction between cases like *Frost, Western Union Telegraph* and others cited by appellant and those like *Atkin* and the others cited above has been succinctly set forth in *Adkins* v. *Children's Hospital,* 261 U. S. 525 (1922), where the Court upheld the constitutionality of conditions in public work contracts: ". . . as depending, not upon the right to condition private contracts, but upon the right of the government to prescribe the conditions upon which it will permit work of a public character to be done for it, or in the case of a state, for its municipalities" (261 U. S. at 547).

That the "condition" imposed by Section 2601 of the Public Authorities Law, and the provisions of the contracts in question mandated by it, is one of the State's legitimate "precautions for the purpose of obtaining perfectly fair and bona fide bids" (*McMullen* v. *Hoffman, supra*), can hardly, it is respectfully submitted, be reasonably disputed. This is especially so in the light of its intent and purpose, as has been seen (see Argument I, *supra*) to elicit appropriate information as to the "qualifications" and responsibility of prospective contractors for future bidding on public contracts, and to weed out and disqualify fraudulent and corrupt ones.

On this subject it may be noted that there are numerous statutory conditions required to be inserted in public contracts, State and Federal, the violation of which result in severe penalties, including "black-listing", which would appear to be even more onerous than that in issue here, and which have withstood the test of judicial scrutiny: Among these are those required by:

The "Buy American" Act, 41 U.S.C., 10b (1933)—Black-listing for failure to comply with requirements to use American made materials.

The Davis-Bacon Act, 40 U.S.C., 276a-2 (1935)—Black-listing for failure to pay prevailing wages.

The Walsh Healy Public Contracts Act, 41 U.S.C., 37 (1936)—Black-listing for violating wage, hours and safety provisions.

As to conditions to public employment, see *United Public Workers* v. *Mitchell,* 330 U. S. 75 (1946), where the Hatch Act, now 5 U.S.C., Section 1502, prohibiting Federal civil service employees from engaging in political activties, was held to be constitutional. Cf.: *Caldwell* v. *Louisiana,* 282 U. S. 801 (1930).

It is a peculiar and obviously inconsistent circumstance in this case that appellant has raised no constitutional issue with respect to the requirement of Section 2604 of the Public Authorities Law that its officer execute, in each of the contracts, a Statement of Non-Collusion (see Statement of Facts, *supra,* p. 2) under penalty of perjury. That was as much a "condition" requiring him to incriminate himself in order for appellant to obtain the privilege or benefit of the contract as was the requirement for answering questions concerning prior public contracts before the Grand Jury. Yet he voluntarily executed it, was indicted, along with appellant, for perjury for falsifying it (A. 110-112), and both subsequently pleaded guilty to a second indictment for Conspiracy to Prevent Competitive Bidding on Public Contracts, to cover both indictments. (See Statement of Facts, *supra,* pp. 5-6, Note 2, and App. 42-43).

This is also a conclusive demonstration of the concrete and eminently reasonable basis, in the public interest, for requiring both the waiver of immunity which is here under challenge, as well as such non-collusive statement. (See *McMullen* v. *Hoffman,* 174 U. S. 639, 651, *supra.*)

Finally, the question might well be asked whether any constitutional attack could possibly be made against similar "conditions" were they to be included in contracts negotiated with or bid upon for a private firm which desired

thereby to reduce the possibility of fraud or collusion. Can it reasonably be said that the public interest and public funds cannot constitutionally be similarly safeguarded?

ARGUMENT IV

Regardless of the outcome of the *Gardner* (No. 635) and *Sanitation* (No. 823) cases, the distinguishing circumstances of the case at bar dictate its affirmance.

It has been contended in this brief (Argument I, *supra*) that if the constitutionality of Section 1123 of the New York City Charter, attacked in the *Gardner* and *Sanitation* cases, is upheld, then *ipso facto* so should be that of Section 2601 of the Public Authorities Law in issue herein, and that the judgment in this case should accordingly be affirmed. Appellee by no means concedes that the converse is true, and respectfully submits that it is not. The distinguishing features of this case, either as a general matter applicable to all public contractors subject to the requirements of the Public Authorities Law, or with respect to this particular appellant as disclosed by this record, or both, are such as to dictate an affirmance herein regardless of the outcome in *Gardner* and *Sanitation*.

A. As Section 2601 of the Public Authorities Law affects contractors generally.

1. It has been asserted that Section 2601 is repugnant to the due process clause of the Fourteenth Amendment. This Court has held, however, that where an adequate judicial review is afforded by a statute affecting property rights, especially where there is provision for a stay pending such review, due process is satisfied. Section 2603 of the Public Authorities Law, as interpreted by the New York Court of Appeals in this case (20 N. Y. 2d 370, at 376-377, *supra*), expressly provides for such review. It

further expressly provides for a stay. Section 1123 of the New York City Charter on its face provides for neither.

In *Bowles* v. *Willingham*, 321 U. S. 503 (1944), this Court said:

> (at 520): "Here Congress has provided for judicial review of the Administrator's action. To be sure, that review comes after the order has been promulgated; and no provision for a stay is made. But as we have held in Yakus v. United States . . . (321 U. S. 414), that review satisfies the requirements of due process. As stated by Mr. Justice Brandeis for a unanimous Court in Phillips v. Commissioner of Internal Revenue, 283 U. S. 589, 596, 597) . . .: 'Where only property rights are involved, mere postponement of the judicial inquiry is not a denial of due process, if the opportunity given for the ultimate judicial determination of the liability is adequate.'"

In *Porter* v. *Investors Syndicate*, 286 U. S. 461 (1932), this Court said:

> (at 470-471): "Where as ancillary to the review and correction of administrative action, the state statute provides that the complaining party may have a stay pending final decision, there is no deprivation of due process, although the statute in words attributes final and binding character to the initial decision of a board or commissioner."

2. What is involved in Section 2601 situations are voluntary undertakings by contractors in competitive bidding for a particular, profitable public contract, with full knowledge of and assent to each of its conditions and specifications, including the requirement for waiver of immunity by its officers in Grand Jury investigations. This is but one of the contractual commitments for which the public agency has bargained, and to which each of

its bidders has subscribed. They should be held to their bargain.

As the New York Court of Appeals has said in *Campbell* v. *City of New York*, 244 N. Y. 317 (citing *Atkin* v. *Kansas*, 191 U. S. 307, *supra*);

> (244 N. Y. at 327): "The contractor takes the contract as the State tenders it, or leaves it altogether. He is not injured in his constitutional rights by being put to the election. * * * He may think the risk too great. He will then decline to enter into relations with a municipality so exacting. He may survey the risk and take it. He will then be bound by the promise according to its meaning * * *".

On the other hand, State statutes having the effect of Section 1123 of the New York City Charter have been imposed upon public employees after entering into their employment, without their assent, and nevertheless held valid. Cf: *Garner, Beilan, Lerner, Nelson, United Public Workers, supra.* Moreover, in these cases the entire livelihood of the public employee was involved. Not so with contractors, who may take their business elsewhere where they will not be subject to the requirements of public contracts here complained of, if they are not prepared to subscribe to them.

3. What a public contractor is required to subscribe to under Section 2601 is an agreement to waive a constitutional privilege which at the most will affect nothing more than a property right, to wit, the contract, which is subject to cancellation, and, if that can also be considered a property right, his opportunity to bid on future public contracts. Such a waiver has been held to be valid. Cooley, in his Treatise on Constitutional Limitations (8th Edition), Vol. 1, says, as to this, on pages 368-369:

> "Where a constitutional provision is designed for the protection solely of the property rights of the

citizen, it is competent for him to waive the protection, and to consent to such action as would be invalid if taken against his will", citing:

Sheppard v. *Barron*, 194 U. S. 553;
Humbird v. *Avery*, 195 U. S. 480;
Pierce v. *Somerset Railway*, 171 U. S. 641, 648.

See also:

Wall v. *Parrot Silver & Copper Co.*, 244 U. S. 407, 412;
Johnson v. *Zerbst*, 304 U. S. 458, 464.

By their voluntary agreement to the contractual provitions mandated by Section 2601 public contractors waive, in effect, not their personal constitutional privilege against self-incrimination, which they may continue to invoke if they choose, but their property rights made a condition to such waiver.

B. As the circumstances of this case, as disclosed by the record, relate to this appellant.

1. It will be noted that although its Notice of Claim filed with appellee by appellant (A. 24-27) sought damages for wrongful cancellation of the contracts and their reinstatement, as well as removal of its disqualification from future bidding, appellant has abandoned the cancellation issue and bases its entire case upon the disqualification from bidding (A. 13, 49, 70). Accordingly, if its asserted right to such future bidding is not one that is cognizable as constitutionally protected, appellant has no case here.

The New York Courts have held that the right to bid is not a property right. *Matter of Haskell-Gilroy, Inc.* v. *Young*, 20 Misc. 2d 294, aff'd 10 A. D. 2d 629, leave to app. den'd 10 A. D. 2d 717.

As such, this Court has held that a prospective bidder does not even have standing to challenge the deprivation

of his asserted right to bid. In *Perkins* v. *Lukens Steel*, 310 U. S. 113 (1940) this Court said:

> (at 125-126): "They claim a standing by asserting that they have particular rights under and even apart from statute to bid and negotiate for Government contracts * * *.
>
> "Section 3709 of the Revised Statutes requires for the Government's benefit that its contracts be made after public advertising. It was not enacted for the protection of sellers and confers no enforceable rights upon prospective bidders * * *."
>
> (at 127): "It was not intended to be a bestowal of litigable rights upon those desirous of selling to the Government; it is a self-imposed restraint for violation of which the Government—but not private litigants—can complain."

Cf. New York Public Housing Law, Section 151 (McKinney's Consolidated Laws of New York, Book 44A) (App. 39).

2. What is before the Court in this particular case is a claim that a constitutional right was infringed, to wit, the Fifth Amendment right to remain silent and not to incriminate oneself. It is said that such infringement resulted from the fact that that right was made "costly" (Ap. Br. 11). To obtain relief from such infringement surely the person who invokes the privilege must show that it became costly to *him*. That person is George Campbell, Jr., an individual who is not even a party to this litigation. Even if he were he could not show such a thing because, as has been seen, having assertedly resigned his offices and surrendered his stock he was, by the repeated and adamant assertions of appellant itself throughout the record (A52, 95-98; and see Note 1, p. 4 of this Brief, *supra*) actually a total stranger to it when he asserted the privilege. Whatever cost there was in this particular case

was not to George Campbell, Jr., the individual who invoked the privilege. There was, of course, a cost to appellant, but that was one it voluntarily subscribed to, knowingly, voluntarily, and in competition with others for these lucrative contracts. The fact that it assumed a risk of action or inaction by a third party is, it is respectfully submitted, purely a contractual and not a constitutional matter. It is nothing new in the law of contracts—and in effect, that is what the lower New York Courts here held (A34; 130).

Were George Campbell, Jr. a party to this litigation and complaining of *his* disqualification—or even, were he a party and complaining of the disqualification of a corporation in which he had an interest at the time he was asked to waive his Fifth Amendment privilege—it might be contended that he was then confronted with a choice which would prove "costly" if he refused to waive, even if indirectly because of such interest. But that is not this case, and, it is respectfully submitted, it will be time enough for this Court to consider it when that situation is presented to it. Cf. *Holland* v. *Hogan*, 272 F. Supp. 855, appeal pending Oct. T., 1967, No. 653.

In this connection it will be noted that the opinion of the New York Court of Appeals herein (A134-135) did not find anything contrary to appellant's claim that George Campbell, Jr. had terminated all relationship with it prior to his refusal to waive. Actually recognizing that as a fact, it held that under the particular circumstances of such termination he "* * * *shall be deemed* to have acted *in his capacity* as a corporate officer when he refused to sign the waiver" (emphasis supplied). Such interpretation of the Court of Appeals, it is respectfully submitted, is binding upon this Court.

3. Finally, this Court has held that the privilege against self-incrimination is a purely personal one, and can neither be asserted by a corporation on behalf of its individual of-

ficer, or by such individual on behalf of a corporation. In *Baltimore and Ohio R. Co.* v. *Interstate Com. Com.*, 221 U. S. 612, this Court said:

> (at 622): "With respect to its officers, it would be sufficient to say that the privilege guaranteed to them by this amendment is a personal one which cannot be asserted on their behalf by the corporation * * *"

See also:

Hale v. *Henkel*, 201 U. S. 43, 47, 75;
Wilson v. *United States*, 221 U. S. 361, 383-385;
Essgee Co. v. *United States*, 262 U. S. 151;
United States v. *White*, 322 U. S. 694, 699.

CONCLUSION

The determination of the New York Court of Appeals appealed from herein should be affirmed.

Dated: New York, New York, April 10, 1968.

Respectfully submitted,

HARRY LEVY,
Attorney for Appellee.

PAUL W. HESSEL,
I. STANLEY STEIN,
of Counsel.

APPENDIX TO APPELLEE'S BRIEF

Public Housing Law, Section 2

§ 2. Policy of state and purpose of chapter

It is hereby declared that in certain areas of cities, towns and villages of the state there exist insanitary and substandard housing conditions owing to overcrowding and concentration of the population, improper planning, excessive land coverage, lack of proper light, air and space, insanitary design and arrangement, or lack of proper sanitary facilities; that these conditions are chiefly in areas where low rent dwellings prevail and that such conditions and dwellings are a menace to the health, safety, morals, welfare and reasonable comfort of the citizens of this state; that there is not an adequate supply of adequate, safe, and sanitary dwelling accommodations for persons of low income; that these conditions cause an increase and spread of disease and crime and constitute a menace to the health, safety, morals, welfare, and comfort of the citizens of the state; that these conditions inflict blight upon the economic value of large areas, impair private investments and the source of public revenues; that these conditions cannot be remedied by the ordinary operation of private enterprise; that these conditions require that provision be made for the investment of public and private funds at low interest rates in low rent housing and the acquisition at fair prices of adequate parcels of property, the gradual demolition of existing insanitary and unsafe housing and the construction of new housing facilities, under public supervision in accord with proper standards of sanitation and safety and at a cost which will permit monthly rentals which persons of low income can afford to pay; that loans and subsidies by the state and its subdivisions are necessary for such purposes; that the clearance, replanning, reconstruction and rehabilitation of substandard and insanitary areas or the providing of adequate, safe and sanitary low rent housing accommodations in these

areas and elsewhere for persons and families of low income, or both of these, are public uses and purposes for which public money may be spent and private property acquired; that these conditions require the creation of the agencies, instrumentalities and corporations hereinafter prescribed, which are declared to be agencies and instrumentalities of the state for the purpose of attaining the ends herein recited; and the necessity in the public interest for the provisions hereinafter enacted is hereby declared as a matter of legislative determination.

Public Housing Law, Section 3

§ 3. Definitions

The following terms, whenever used or referred to in this chapter, shall have the following meaning, unless a different meaning clearly appears from the context:

* * * * * *

2. The term "authority" means a public corporation which is a corporate govermental agency (except a county or municipal corporation) organized pursuant to law to accomplish any or all of the purposes specified in article eighteen of the constitution and includes the following municipal housing authorities established prior to the first day of January, nineteen hundred thirty-nine pursuant to chapter four of the laws of nineteen hundred thirty-four and amendments thereof, namely, . . . New York city housing authority, . . .

Public Housing Law, Section 401

§ 401. New York City Housing Authority

* * * * * *

The New York City Housing Authority is hereby constituted and declared to be a body corporate and politic with all the powers, rights and duties set forth in article five of the former state housing law.

Public Housing Law, Section 151

§ 151. Authority construction contracts

Contracts of an authority for demolition, excavation, construction, alteration, renovation or for purchase of materials or supplies shall be in such form and contain such combination of work or trades and such terms and provisions as may be deemed advisable by the authority. All such contracts in excess of ten thousand dollars shall be made on sealed bids, in compliance with a public notice advertised at least once, not less than twenty days before the date set for the receipt of bids, in the official publication of the municipality, or if none exists, in a newspaper circulating in the municipality. If the authority shall deem it to its best interest or necessary or desirable to effectuate the purposes of this chapter or the economy and efficiency in construction and operation of a project, the authority by majority vote of its members may either reject all bids or readvertise for bids or by unanimous vote of its members may accept a bid other than the lowest bid. In any such contract there may be inserted in the discretion of the authority, a provision that additional work may be done or materials and supplies furnished or that work or materials may be omitted for the purpose of completing such contract in accordance with any changes, omissions or additions in the specifications of any such contract. Each contract shall provide that in the case of default by the contractor the authority may adopt on behalf of the authority all subcontracts made by such contractor and all such subcontractors shall be bound by such adoption if made, and the authority may relet, with or without public advertisement, the work specified in the original contract, exclusive of so much thereof as shall be provided in any subcontracts so adopted. An authority may make rules and regulations governing the qualifications of bidders, the submission of combined bids by two or more contractors, the award and execution of the contract, security, if any, for execution and performance of the contract, and any

other matters relating to the contract. The bidding may be restricted to those who shall have qualified prior to the receipt of bids according to standards fixed by the authority, provided that notice or notices for the submission of qualifications shall be published in the official publication of the municipality, or if none exists, in a newspaper circulating in the municipality, at least once, not less than ten days prior to the date fixed for the filing of qualifications. Nothing in this section shall be construed to limit the power of the authority to carry out a project or any part thereof directly by the officers, agencies and employees of the authority, or by any government, or to purchase or acquire materials or supplies through the purchasing officer, department or agency of a government.

Public Housing Law, Section 157 (1)

§ 157. Claims and actions against authorities

1. In every action or special proceeding, for any cause whatsoever, prosecuted or maintained against an authority, the complaint or necessary moving papers shall contain an allegation that at least thirty days have elapsed since the demand, claim or claims upon which such action or special proceeding is founded were presented to the authority for adjustment and that it has neglected or refused to make an adjustment or payment thereof for thirty days after such presentment.

Article 18, Section 1, New York State Constitution

§ 1. [Housing for persons of low income; slum clearance.]

Subject to the provisions of this article, the legislature may provide in such manner, by such means and upon such terms and conditions as it may prescribe for low rent housing for persons of low income as defined by law, or for the clearance, replanning, reconstruction and rehabilitation of substandard and insanitary areas, or for both such purposes, and for recreational and other facilities incidental or appurtenant thereto.

McKinney's 1964 Session Laws of New York, Chapter 645, p. 1023—(Public Authorities Law, Section 2604)

§ 2604. Statement of non-collusion in contract with public authority

Every contract hereafter made or awarded by a public authority or by any official of any public authority created by the state or any political subdivision, pursuant to bid, for work or services performed or to be performed or goods sold or to be sold, shall contain the following statement subscribed by the bidder, and affirmed by him as true under the penalties of perjury: Non-collusive bidding certification. The bidder certifies that: (a) the bid has been arrived at by the bidder independently and has been submitted without collusion with any other vendor of materials, supplies, or equipment of the type described in the invitation for bids, and (b) the contents of the bid have not been communicated by the bidder, nor, to its best knowledge and belief, by any of its employees or agents, to any person not an employee or agent of the bidder or its surety on any bond furnished herewith prior to the official opening of the bid.

MISCELLANEOUS CERTIFICATE

No. 847

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

On Indictment for Conspiracy, etc.

No. 3954-66

Filed October 17, 1966

THE PEOPLE OF THE STATE OF NEW YORK,

against

GEORGE CAMPBELL and GEORGE CAMPBELL & CO., INC.,

Defendants.

I, JAMES McGURRIN, County Clerk and Clerk of the Supreme Court, New York County, do certify that it appears from an examination of the Records on file in this office, that on January 8, 1968 the above defendants pleaded guilty during trial of Conspiracy to Prevent Competitive Bidding on Public Contracts to cover this indictment and also to cover Indictment No. 2435-65, before the Honorable Irwin D. Davidson, a Justice of this Court. Date for sentence is set for April 16, 1968.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal this 12 day of January, 1968.

JAMES McGURRIN
County Clerk and Clerk of the Supreme Court, New York County.

NO FEE
FOR OFFICIAL USE

MISCELLANEOUS CERTIFICATE

No. 892

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

on Indictment for Perjury in the First Degree

No. 2435-65

Filed June 24, 1965

THE PEOPLE OF THE STATE OF NEW YORK,

against

GEORGE W. CAMPBELL, JR. and
GEORGE CAMPBELL PAINTING CORP.

I, JAMES McGURRIN, County Clerk and Clerk of the Supreme Court, New York County, do certify that it appears from an examination of the Records on file in this office, that on January 8, 1968 George W. Campbell, Jr. pleaded guilty to Conspiracy to prevent competitive bidding on public contracts — count nine to cover indictment No. 3954-66 and to also cover Indictment No. 2435-66.

That on January 8, 1968, George Campbell Painting Corp. pleaded guilty to Conspiracy to prevent competitive bidding on public contracts, count nine to cover Indictment No. 3954-66 and to also cover Indictment No. 2435-66.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal this 2 day of April, 1968.

JAMES McGURRIN
County Clerk and Clerk of the Supreme Court,
New York County.

NO FEE
FOR OFFICIAL USE

SUPREME COURT, U. S.
APR 18 1968
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1967

No. 673

GEORGE CAMPBELL PAINTING CORP.,

Appellant,

against

WILLIAM REID, FRANCIS V. MADIGAN, IRA S. ROBBINS, Members of the New York City Housing Authority, and THE NEW YORK CITY HOUSING AUTHORITY,

Appellees.

GEORGE CAMPBELL PAINTING CORP.,

Appellant,

against

WILLIAM REID, FRANCIS V. MADIGAN, IRA S. ROBBINS, Members of the New York City Housing Authority, and THE NEW YORK CITY HOUSING AUTHORITY,

Appellees.

On Appeal from the Court of Appeals of the State of New York

APPELLANT'S REPLY BRIEF

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Of Counsel

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Appellant,

against

WILLIAM REID, FRANCIS V. MADIGAN, IRA S. ROBBINS, Members of the New York City Housing Authority, and THE NEW YORK CITY HOUSING AUTHORITY,

Appellees.

On Appeal from the Court of Appeals of the State of New York

APPELLANT'S REPLY BRIEF

1. Both the Attorney General and the appellees argue that appellant corporation has no standing to challenge the

constitutionality of the statute which mandated its disqualification (A.G.Br. pp. 20-22; H.A.Br. pp. 34-36).*

The reason they assert for this is that a corporation cannot assert the privilege against self-incrimination.

Both have totally misconceived the issue. Appellant is not asserting the privilege against self-incrimination. Appellant is objecting to a penalty imposed against it under a statute that declares that it was a punishable wrong for one of appellant's former officers to have refused to waive his privilege against self-incrimination. Appellant's argument is that the assertion of the privilege cannot be made a wrong from which penalties flow, and that a statute which imposes such penalties is unconstitutional.

The argument against appellant's standing is like denying to a master in a *respondeat superior* case the opportunity to show that the servant's conduct was not tortious. If George Campbell, Jr. committed no punishable wrong by refusing to waive his privilege against self-incrimination, then *a fortiori* the appellant has committed no punishable wrong. If the statute is unconstitutional because it makes the assertion of the privilege a punishable offense, then surely appellant, as victim of the punishment, has standing to object.

Neither the Attorney General nor appellees Housing Authority have come to grips with the issue posed by the *Malloy, Griffin* and *Spevack* cases (see Appellant's Brief,

* Reference to the Attorney General's brief will be designated "A.G.Br." followed by the page number; reference to the appellees' brief will be designated "H.A.Br." followed by the page number.

pp. 10-12), that even if the State's action had not been arbitrary under the *Slochower* test, the statute still would be repugnant to the Constitution in that it punishes people because of their assertion of the privilege against self-incrimination. Both argue, however, that the privilege must bend to the overriding interests of the State. But, while the due process clause has always been applied with a view toward resolving the competing interests of the State and the individual, this has not been the case with the privilege against self-incrimination which has always been deemed an essential inconvenience for the government. *Hoffman* v. *United States,* 341 U. S. 479, 95 L.ed. 1118, 71 S.Ct. 814 (1950).

The privilege against self-incrimination, then, is not subject to any balancing of interests. Complete immunity is essential as the *quid pro quo* for compulsory testimony. See opinion of Mr. Justice Brandeis in *McCarthy* v. *Arndstein,* 266 U. S. 34, 42, 69 L.ed. 158, 161, 45 S.Ct. 16 (1924). The Attorney General argues that the decision in *Garrity* v. *New Jersey* makes the rule in *Spevack* v. *Klein* superfluous (A.G.Br. p. 15). But this cannot be so long as *Stevens* v. *Marks* is still good law. 383 U. S. 234, 15 L.ed. 2d 724, 86 S.Ct. 788 (1966). *Garrity* held that the testimony coerced by threat of dismissal could not be introduced in evidence. In *Stevens* v. *Marks* this Court, citing *Raley* v. *Ohio,* 360 U. S. 423, 3 L.ed. 2d 1344, 79 S.Ct. 1257 (1959), noted that anything short of full and complete immunity was inadequate as a *quid pro quo* for compulsory self-incrimination (383 U. S. at p. 246).

Appellees and the Attorney General would have this Court believe that Sections 2601 and 2602 of the Public

Authorities Law are the only effective means available to the State to accomplish its legitimate ends. Plainly, this is not so. The State could compel the testimony of witnesses by granting them immunity and, if their testimony showed them to be unfit, then the result could be disqualification. The State cannot complain that it will lose the opportunity to punish criminals, for if the State could not convict without self-incriminatory testimony, then it would lose nothing by granting immunity. It is perfectly feasible and constitutional to provide immunity in exchange for compulsory testimony. Moreover, it also makes more sense to disqualify for actual misconduct than for asserting constitutional rights.

2. Both the Attorney General and appellees argue that the Public Authorities Law, Sections 2601 and 2602 fulfill an important state purpose of obtaining information about the qualifications of potential contractors (A.G.Br. pp. 10-16; H.A.Br. pp. 11-17). But, a Grand Jury cannot supply the State with any useful information because its proceedings are secret. Code of Crim. Proc. §§258 and 259.

Even before the *Spevack* case New York courts distinguished between the reasonable requirement of candor before appropriate boards of inquiry and the behaviour of witnesses in the Grand Jury room. Thus, in *In Re Solovei*, 250 App. Div. 117, 293 N.Y.S. 640 (2nd Dept. 1937), aff'd without opinion 276 N.Y. 647, 12 N.E.2d 802 (1938), an attorney asserted his privilege against self-incrimination before a Grand Jury without suffering any professional sanction. The Court distinguished between a refusal to waive immunity and a refusal to answer questions. Similarly, in

In Re Grae, 282 N.Y. 428, 26 N.E.(2d) 963 (1940), the refusal to sign a waiver of immunity even in a bar association inquiry was held not to be the equivalent of a refusal to be candid. See also, *In Re Ellis,* 282 N.Y. 435, 26 N.E.2d 967 (1940); *In Re Levy,* 255 N.Y. 223, 174 N.E. 461 (1931); *In Re Rouss,* 221 N.Y. 81, 116 N.E. 782 (1917), Cert. den. 246 U.S. 661, 62 L.ed. 927, 38 S.Ct. 332 (1918); and *In Re Kaffenburgh,* 188 N.Y. 49, 80 N.E. 570 (1907). Here, as in *Grae,* there was no refusal to answer, there was only a refusal to waive immunity.

Appellees and the Attorney General in their arguments have failed to recognize the vast distinction between the closed hearing conducted by a Grand Jury and one conducted by a board of inquiry concerned with the qualifications of applicants or licensees.

The appellees argue (A.G.Br. pp. 14-16) that a New York Grand Jury is empowered to make presentments and issue public reports about non-public officials under the authority granted by Section 253(a) of the Code of Criminal Procedure (set forth in full in the Appendix to Appellant's Brief, pp. 25-27). They deliberately overlook the express provision of that statute which limits such powers of investigation to public officials and public employees. *In Re Grand Jury, January, 1967,* 52 Misc. 2d 895, 277 N.Y.S.2d 105 (Sup. Ct. Cortland Co. 1967). Neither the statute nor any case or authority has been cited by appellees which would remotely suggest that the Grand Jury has been granted general investigatory powers. The only decided case holds otherwise and, indeed, imposed a further limitation that the investigation cannot have been spontaneous. *In Re Grand Jury, January, 1967, supra.*

Consequently, even if the sole test were due process, the statute as applied here does not pass even the requirements laid down by *Slochower*. No questions were asked, and the inquiry was not related to a determination of fitness.

3. The appellees imply (H.A.Br. p. 9) that perhaps this Court ought to indulge in reading between the lines for some unspecified relevance concerning the fact that on the opening day of trial appellant pleaded guilty to a single misdemeanor count, Penal Law §581A, to cover two indictments. Appellant rejects this contention because, if there is to be reading between the lines, it is more relevant that if appellant had to defend itself during a three months' mass conspiracy trial the cost would have exceeded by far the maximum fine that could be imposed under Penal Law §581A.

The District Attorney consented to the misdemeanor plea and agreed to allow it to cover two indictments. During the trial neither the prosecution nor the defense called George Campbell, Jr. or any other person connected with appellant to testify. District Attorneys do not ordinarily consent to misdemeanor pleas without a plea bargain unless they believe that the degree of culpability and the risks of trial warrant it. The court also accepted the misdemeanor plea.

4. Finally, the appellees argue that a proceeding under §2603 is available to appellant and that this would satisfy all of its due process objections (H.A.Br. pp. 17-20). What they fail to observe is that the Court of Appeals held that the statute's reference to "officers" includes former officers whose resignations occurred at the time they planned to

refuse to waive their privilege against self-incrimination (A42-43). All that the Court of Appeals suggested was that there was discretion under §2603 to grant relief from a proper disqualification if the application of the statute worked an unnecessary hardship. Appellant's claim is that its disqualification was improper. Appellant is not begging for forgiveness, which is all that the statutory remedy involves. It has a right not to be penalized by an invalid statute. Its remedy cannot be limited by that same statute.

Respectfully submitted,

THEODORE M. RUZOW
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ALBERT A. BLINDER
HARRY LIPNER
STEPHEN HOCHHAUSER
Of Counsel

SUPREME COURT OF THE UNITED STATES

No. 673.—October Term, 1967.

George Campbell Painting Corp., Appellant, v. William Reid et al.	On Appeal From the Court of Appeals of New York.

[June 10, 1968.]

Mr. Justice Fortas delivered the opinion of the Court.

The Public Authorities Law of New York, § 2601, provides that a clause must be inserted in all contracts awarded by a public authority of the State for work or services to provide that upon refusal of "a person" to testify before a grand jury, to answer any relevant question, or to waive immunity against subsequent criminal prosecution, such person and any firm or corporation of which he is a member, officer, or director shall be disqualified for five years from contracting with any public authority, and any existing contracts may be canceled by the public authority without incurring any penalty or damages.[1]

During 1964, appellant, a closely held family corporation, entered into three painting contracts with the appellee, New York City Housing Authority. Each of these contained the standard disqualification clause. The contracts were executed by appellant's president, George Campbell, Jr., who was also a director and stockholder of the corporation.

Early in 1965, appellant became aware that the District Attorney of New York County was conducting an investigation before a grand jury of alleged bid rigging on public contracts including those of appellant. There-

[1] Section 2602 provides for disqualification on the same basis without reference to any contractual clause.

after, George Campbell, Jr., resigned as appellant's president and director and divested himself of his stock. He remained in appellant's employ as an "estimator."

A few weeks thereafter, Campbell was subpoenaed to appear before the grand jury. He refused to sign the waiver of immunity. In due course, the Public Housing Authority notified appellant that, pursuant to the provision in its contracts, the contracts were terminated and Campell and the corporation were disqualified from doing business with the Authority for five years.

After proceedings in the lower courts of New York, the New York Court of Appeals denied relief to appellant. It held that the disqualification was valid and that § 2601 of the Public Authorities Law is constitutional, citing *Gardner* v. *Broderick*, 20 N. Y. 2d 227, 229 N. E. 2d 184 (1967) (reversed this day, *ante*). The Court of Appeals also rejected appellant's claim that it should not have been disqualified because Campbell resigned as president and director before he was called to testify.[2] We noted probable jurisdiction. — U. S. — (1968).

We do not consider the constitutionality of § 2601 of New York's Public Authorities Law or the validity or effect of the contract provisions incorporating that section. Appellant's claim is that these provisions operated unconstitutionally to require its president, Mr. Campbell, to waive the benefits of his privilege against self-incrimination. But appellant cannot avail itself of this point, assuming its validity. It has long been settled in federal jurisprudence that the constitutional privilege against self-incrimination is "essentially a personal one, applying only to natural individuals." It "cannot be utilized by or on behalf of any organization, such as a corporation." *United States* v. *White*, 322 U. S. 694, 698, 699 (1944);

[2] The Court of Appeals noted that § 2603 of the Public Authorities Act vests the State Supreme Court with jurisdiction, for stated reasons, to remove the disqualification.

see also *Essgee Co.* v. *United States*, 262 U. S. 151 (1923); *Baltimore & Ohio R. Co.* v. *ICC*, 221 U. S. 612, 622 (1911); *Wilson* v. *United States*, 221 U. S. 361, 382–385 (1911); *Hale* v. *Henkel*, 201 U. S. 43, 74–75 (1906). If a corporation cannot avail itself of the privilege against self-incrimination, it cannot take advantage of the claimed invalidity of a penalty imposed for refusal of an individual, its president, to waive the privilege. Since the privilege is not available to it, appellant, a corporation, cannot invoke the privilege to challenge the constitutionality of § 2601 of the Public Housing Authorities Law. *A fortiori*, it cannot assail the validity of the provision in the contracts into which it entered, incorporating the substance of that section.

As to appellant's claim that its due process rights were denied by the imposition of the penalty despite Mr. Campbell's purported resignation from managerial positions, we do not reach the abstract legal question that is urged upon us. We see no reason to disturb the finding of the New York Court of Appeals that "the resignation was tendered and accepted solely for the purpose of avoiding the statutory disqualification," and the conclusion of that court that the purported resignation should be disregarded for purposes of this case.

Affirmed.

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Mr. Justice Douglas, with whom Mr. Justice Black concurs, dissenting.

Appellant corporation has been disqualified as a contractor with the State of New York because its president, George Campbell, Jr., who was also a director and an owner of 10% of its stock, invoked the protection of the Self-Incrimination Clause of the Fifth Amendment when summoned before the grand jury. All other officers, directors, and the controlling stockholders of this closely held corporation appeared and indicated a willingness to sign waivers of immunity and to testify. The president, who invoked the Self-Incrimination Clause, resigned as officer and director and agreed to sell his 10% stock interest, though so far as appears the contract of sale has not been consummated.[1]

In the old days when a culprit, unpopular person, or suspect was punished by a bill of attainder, the penalty imposed often reached not only his own property, but

[1] One of the directors of the corporation testified before appellee New York City Housing Authority that no consideration was paid for the stock at the time of transfer, and that there was as yet no formal or informal agreement as to payment for the stock.

Moreover, the pleadings reveal that George Campbell, Jr., was at all times relevant here a 10% residuary legatee under the estate of his late father. That estate contained 50% of the stock of appellant corporation. Thus, George Campbell, Jr., possessed a substantial additional interest in the corporation which would likely be affected by any increase or decrease in the value of the stock.

also interests of his family.[2] When the present law blacklists this family corporation, it has a like impact.

I fail to see how any penalty—direct or collateral—can be imposed on anyone for invoking a constitutional guarantee. A corporation, to be sure, is not a beneficiary of the Self-Incrimination Clause, in the sense that it may invoke it. *United States* v. *White,* 322 U. S. 694. Yet placing this family corporation on the blacklist and disqualifying it from doing business with the State of New York is one way of reaching the economic interest of the recalcitrant president.[3] If, as I felt in *Spevack* v. *Klein,* 385 U. S. 511, placing the penalty of disbarment on a lawyer for invoking the Self-Incrimination Clause is unconstitutional, so is placing a monetary penalty on a businessman for doing the same.[4] Reducing the value

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[2] *E. g.*, Delaware Laws 1778, c. 29b; New Jersey, Act of Dec. 11, 1778, Laws, p. 40. Compare North Carolina Laws, Session of April 14, 1778, c. 5, calling for confiscation of the estates of certain persons "inimical to the United States," but specifically providing that members of their families should be allowed that portion of the estate forfeited which they might have enjoyed had the owner died intestate. See also *Bayard* v. *Singleton,* 1 Martin's No. Car. Rep. 42 (1787). And see, Comment, The Supreme Court's Bill of Attainder Doctrine: A Need for Clarification, 54 Calif. L. Rev. 212, 214, 216 (1966).

[3] Damage to shareholders which results indirectly from damage done to the corporation can, of course, be rectified through suit by the corporation itself or by a stockholder's derivative action. *E. g.*, *Paulson* v. *Margolis,* 234 App. Div. 496, 255 N. Y. S. 568 (Sup Ct. 1932). See generally Ballantine, Corporations 333–339 (1946); 13 Fletcher Cyclopedia, Corporations §§ 5908–5911 (1961). There is no indication in the opinion of the New York Court of Appeals that that remedy is inappropriate on the facts of this case.

[4] The fact that appellant may petition the New York courts for discretionary relief under § 2603 of the New York Public Authorities Law does not cure the defect. For appellant's claim is that its disqualification was improper, and that it was penalized pursuant to an unconstitutional statute. Its remedy cannot be limited by § 2603, which was construed by the New York Court of Appeals below to

of appellant corporation by putting it on the State's blacklist is a penalty which every stockholder suffers. If New York provided that where a businessman invokes the Self-Incrimination Clause of the Fifth Amendment he shall forfeit, say, $10,000, the law would plainly be unconstitutional as exacting a penalty for asserting a constitutional privilege. What New York could not do directly, it may not do indirectly. Yet penalizing this man's family corporation for his assertion of immunity has precisely that effect.

The Supremacy Clause of the Constitution (Art. VI, cl. 2) gives the Fifth Amendment, now applicable to the States by reason of the Fourteenth, controlling authority over New York's law.

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grant the state courts discretion to afford relief from a proper disqualification when the application of the statute would cause an unnecessary hardship. Indeed, § 2603 by its terms does not even involve a review of the basis for the disqualification, but provides that any disqualified corporation may apply to the New York Supreme Court to discontinue the disqualification:

"Such application shall be in the form of a petition setting forth grounds, including that the cooperation by petitioner with the grand jury at the time of the refusal was such, and the amount and degree of control and financial interest, if any, in the petitioning firm, partnership or corporation by the member, partner, officer or director who refused to waive immunity is such that it will not be in the public interest to cancel or terminate petitioner's contracts or to continue the disqualification . . . ."